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No. 97- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TRUSTEES OF BOSTON UNIVERSITY

Petitioner,

v.

LINKAGE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PETITION FOR A WRIT OF CERTIORARI.

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September 30, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

156 pp

QUESTIONS PRESENTED

I. Whether the Supreme Judicial Court of Massachusetts's selective application of the punitive component of Massachusetts General Laws Chapter 93A, in direct contradiction to, and without overruling, its own precedent exempting similarly situated charitable educational institutions violated Boston University's right to equal protection of the laws under the Fourteenth Amendment and, as a consequence, impermissibly restricts the ability of *all* charitable institutions to promote their charitable goals by subjecting their assets to an unreasonable and unpredictable risk of forfeiture.

II. Whether the Supreme Judicial Court's selective application of Massachusetts General Laws Chapter 93A improperly violated the University's First Amendment right to academic freedom by rendering an arbitrary decision that, if allowed to stand, threatens similarly to infringe the First Amendment rights of all institutions of higher education.

III. Whether the Supreme Judicial Court violated Boston University's Fourteenth Amendment right to due process and, in so doing, unfairly deprived the University of scarce charitable resources, by refusing to reverse an unconscionable judgment that was unconstitutionally tainted by the trial judge's (i) presiding over the trial despite his obvious and extreme bias against Boston University and Dr. John Silber, the University's president and principal witness; (ii) improperly striking, after seven weeks of trial and on the basis of manifestly false accusations by plaintiff's counsel, a trial exhibit which set forth the uncontested facts of the case, which the trial judge had previously approved, and to which the University's counsel had already referred so extensively that it had become a cornerstone of the University's defense; and (iii) awarding grossly excessive and obviously punitive damages in an amount more than eighty times greater than any potentially legitimate compensatory award.

LIST OF PARTIES

The parties to this proceeding are as listed in the caption, Petitioner Trustees of Boston University and Respondent Linkage Corporation. Pursuant to Rule 29.1 of this Court, Petitioner states that neither Petitioner nor Respondent has parent or subsidiary corporations that are not wholly owned.

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Petitioner Trustees of Boston University (the "University") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Massachusetts Supreme Judicial Court ("Supreme Judicial Court") entered in this proceeding on May 15, 1997.

OPINIONS BELOW

The Opinion and Order of the Supreme Judicial Court, denying portions of the University's appeal and allowing portions of Respondent Linkage Corporation's ("Linkage") cross appeal, is reported at 425 Mass. 1, 679 N.E.2d 191 (1997), and is reprinted starting at page 1a of the Appendix to this Petition.[1]

The Superior Court's Amended Memorandum of Decision on Defendant's Motion for New Trial on Plaintiff's Chapter 93A Claim and Findings of Fact and Conclusions of Law on Plaintiff's Chapter 93A Claim, from which the University's appeal was taken, was not reported but is reprinted starting at page 38a. The Superior Court's Memorandum of Decision and Order on Defendant's Motion for Summary Judgment and on Plaintiff's Motion to Amend Complaint was not reported but is reprinted starting at page 84a.

JURISDICTION

The Supreme Judicial Court's Opinion and Order was entered on May 15, 1997. The University timely petitioned for rehearing pursuant to Mass. R. App. P. 27 on May 29, 1997. On July 3, 1997, a single justice of the Supreme Judicial Court denied the University's Petition for Rehearing. The order denying the University's Petition for Rehearing is reprinted starting at page 111a. Accordingly, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The questions presented in this Petition involve the interpretation and applicability of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States (U.S. Const. Amend. XIV, § 1), the First Amendment

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[1] All pages references with an "a" suffix are to the Appendix to this Petition.

to the Constitution of the United States (U.S. Const. Amend. I), and Massachusetts General Laws Chapter 93A, §§ 1, 2 and 11. These provisions are reprinted starting at page 112a.

STATEMENT OF THE CASE

A. *Introduction*

The award against Boston University followed, both sequentially and as a matter of cause and effect, a series of highly prejudicial decisions by the trial judge (Judge Vieri Volterra) which deprived the University of favorable rulings of law it had properly earned from another judge during pretrial proceedings and which crippled the University's trial defense. The judge's actions, including adopting a role properly reserved for an appellate court, were so unjustified that they can only have been the product of his oft-expressed bias against the University and Dr. John Silber, its then-president and principal witness in this case. No other explanation is possible, much less plausible.

In short, Boston University now faces a judgment of more than $7.5 million because Judge Volterra would not let the trial proceed in a fair manner, depriving the University its constitutional right to due process, and the Supreme Judicial Court, in conflict with its own standards for recusal, refused to order a new trial. But this case involves more than the imposition of an unfair and grossly excessive monetary judgment. The University did not only lose money; it was deprived of its rights under the Fourteenth Amendment of the Constitution to the equal protection of the laws and under the First Amendment to freedom of speech, because of an irrational and inconsistent application of the state law upon which the Supreme Judicial Court based its award of punitive double damages.

The judgment at issue here stands as a threat not only to Boston University's financial interests, and not only to the integrity of the judicial process, but to the academic freedom of every institution of higher learning in Massachusetts. Unless overturned, the judgment will set an improper and unacceptable nationwide precedent advocating the biased, last-minute manipulation of Rule 56 of the Rules of Civil Procedure at trial and the undermining of academic freedom. More importantly, the decision threatens all charitable institutions because, if left undisturbed, it will be used nationwide by litigants

urging the judiciary to dismantle the numerous privileges and protections historically afforded such institutions.

B. *Factual Background*

Boston University is a charitable institution charged with a broad educational mission, which includes, *inter alia*, offering degree-granting programs, operating extension and continuing education programs, and providing a host of educational opportunities overseas. The University also conducts massive research efforts in medicine and technology, and in support of national defense. To fund this work, the University depends on the generosity of its alumni, significant scholarship funds (Pell Grants and Stafford Loans, to name but two), tuition payments from its students and their parents, and government grants from such agencies as the Department of Defense, the Department of Education, the National Institutes of Health and the National Science Foundation.

In 1987, seeking to expand the scope of its educational efforts, the University acquired, partially by gift from Dr. An Wang, a facility located in Tyngsboro, Massachusetts, known as the Wang Institute. This acquisition gave the University a suburban venue for its continuing corporate education courses, then offered only at the University's Metropolitan College campus in Boston. Reflecting the spirit and purpose of the acquisition, the University renamed the Wang Institute the Boston University Corporate Education Center ("BUCEC").

In 1988, a person named Philip J. Harkins ("Harkins") proposed that the University hire him, through a corporation he proposed to form (which became Linkage Corporation) to manage BUCEC for the University. After a series of discussions involving senior University officials, Dr. John Silber ("Dr. Silber"), the president of the University, approved Harkins's proposal, and Linkage and the University executed a three-year contract (the "Base Agreement"). The Base Agreement commenced on August 1, 1988 and was to terminate on July 31, 1991.

Among its other significant provisions, the Base Agreement stated in plain terms that all programs, materials and other intellectual property developed by Linkage during its tenure at BUCEC would be the exclusive property of the University. This

was a *quid pro quo* for the generous funding that the University poured into BUCEC, and for Linkage's own compensation, which consisted of a fixed annual fee from which Linkage paid its own expenses and then enjoyed the remaining profits.

Primarily because Linkage was unable to control its costs, Linkage's profits during the three-year term of the Base Agreement were modest. Linkage netted only $54,000 in its best year, and projected a profit of only $9,000 for the last six months of the Base Agreement. Had Linkage not been credited with the revenues from highly successful programs, long-established by the University through its Metropolitan College, which had been transferred to BUCEC, Linkage's losses would have been massive. Nevertheless, as the Base Agreement's termination date approached in 1991, Harkins began exploring the possibility of continuing the arrangement between Linkage and the University. These explorations consisted entirely of discussions with Joseph Meng ("Meng"), a University vice president who had no authority to bind the University to a contract. Harkins knew this: both he and Meng had been told that there could be no new contract or extension of the Base Agreement without the express approval of Dr. Silber, so he and Meng merely prepared a draft contract that was submitted for approval to senior University officials.

Because Dr. Silber had strong reservations about Linkage and the draft contract, he instructed that no contract was to be signed until his concerns were addressed. In particular, Dr. Silber had been advised that there were serious quality and performance problems with Linkage's instructors and operations. He had also been informed that Linkage had engaged in false advertising, a fact that raised grave doubts about the company's competence to manage the BUCEC facility and about the prudence of a continued association with the University. Moreover, the proposed contract would have required the University — which had already invested millions of dollars in BUCEC — to increase its overall financial obligations by millions more *and*, despite Linkage's unsatisfactory record, to increase Linkage's management fee by 67 percent in the first year alone.

Dr. Silber was rightly concerned that extending Linkage's management of the BUCEC facility might not be in the best interests of the University. Accordingly, rather than approve the proposed contract, Dr. Silber scheduled a meeting with Harkins and others for June 24, 1991.

At least two months before that meeting, Dr. Silber had begun to request that Linkage and Meng provide him with certain financial information, so that he could determine whether Linkage was adding value to BUCEC or, conversely, whether Linkage's costs were actually exceeding the tuition revenues it was generating. Neither Meng nor Linkage provided that information, however, either before or at the June 24 meeting.

Dr. Silber would not, and prudently could not, commit the University to the proposed extension on Linkage's (or Meng's) undocumented say-so. He therefore requested that the University's internal audit division conduct an audit of Linkage's performance at BUCEC.

The audit report fully confirmed Dr. Silber's concerns. It showed that Linkage's programs at BUCEC lost money, and that the only profitable programs were the University's several for-credit programs which the University had established at BUCEC well *before* Linkage had arrived on the scene. Indeed, were it not for these University-initiated programs, BUCEC would have been losing money overall. Linkage had not developed these profitable programs, had no responsibility for them, and had contributed in no way to the revenues that they generated.

Linkage received a copy of the audit report. Not surprisingly, therefore, when Harkins next met with Dr. Silber on July 1, 1991, Harkins himself proposed *not* to execute the contract extension, but rather suggested a mutual cessation of the Base Agreement, with an orderly transition of programs and personnel to the University.

Harkins failed to tell Dr. Silber, however, that Linkage's agenda for an "orderly" transition included the wholesale theft of University property. Before the July 1 meeting took place, Harkins and other Linkage personnel had begun copying the computerized records and files of BUCEC. These valuable files contained all of BUCEC's student lists, course materials, and operational records, which under the terms of the Base Agreement were the exclusive property of the University and could not be used or taken by Linkage. Nevertheless, Harkins took the downloaded records, and the University never saw them again.

The University had invested more than $10,000,000 in BUCEC, and to protect that investment it had obtained Linkage's contractual commitment to respect the University's property rights. Once it learned that Linkage was flouting that promise and committing

outright theft, the University's attitude toward the proposed "orderly" transfer understandably hardened. To prevent Linkage from completing its pilferage of University property, the University offered Linkage an immediate neutral termination of the contract, which in any event was due to expire by its own terms less than one month later, on July 31, 1991.

When Harkins refused and instead sought to delay Linkage's withdrawal from BUCEC, the University determined that Linkage had, by theft of property, breached the Base Agreement. In order to prevent further theft of its property, the University was forced to assume control of, and deny Linkage further access to, the BUCEC campus.

C. *The Superior Court Action*

Shortly thereafter, on July 11, 1991, Linkage filed a ten-count Complaint against the University. Principally, the Complaint charged the University with breaching the terms of the Base Agreement, and with failing to honor what Linkage alleged was the completed 1991 renewal of that contract.[2]

The case was assigned to Judge Patrick King, and in due course, on June 15, 1993, Judge King awarded the University summary judgment on most of Linkage's claims. Based upon the extensive evidentiary record presented by the parties, Judge King determined that the following facts, among others, were not in dispute: (1) that Meng, who had negotiated the proposed extension with Linkage, did not have authority to bind the University to a renewal contract; (2) that Linkage knew Meng lacked authority; and (3) that the University had never agreed to a renewal contract. Accordingly, Judge King held that, as a matter of law, the University and Linkage had not executed a renewal contract, and he dismissed Linkage's claim that the University had breached such an agreement.

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[2] The Complaint alleged ten separate causes of action against the University, including claims for breach of contract; wrongful entry and eviction; defamation; intentional and/or tortious interference with advantageous relations; breach of the covenant of good faith and fair dealing; estoppel; violation of Massachusetts General Laws Chapter 93A, the state consumer protection statute; and a request for declaratory judgment under Massachusetts General Laws Chapter 231A.

Judge King also rejected Linkage's claim that the University was estopped from denying that *Meng* had promised that the agreement would be renewed. The judge held that any purported reliance upon Meng's promise would have been unreasonable as a matter of law given Meng's acknowledged lack of authority. Finally, Judge King dismissed Linkage's claims for wrongful entry and eviction, breach of the implied covenant of good faith and fair dealing, and for a declaratory judgment.

Judge King's summary judgment ruling dealt a severe blow to Linkage's litigation prospects. It correctly removed from the case the possibility that Linkage could recover damages for any supposed future profits following the termination of the Base Agreement in July 1991. Linkage's contract damages, if any, would be limited to those connected with the Base Agreement itself.

Because Judge King's legal reasoning was unassailable, Linkage chose instead to challenge the judge's integrity. Two years into the case, but shortly after Judge King's summary judgment order, Linkage suddenly moved to recuse Judge King on the grounds that some 20 years earlier he had attended the University's law school and 16 years earlier had been an associate at the law firm that was the University's trial counsel. These facts had been disclosed to Linkage long *before* the summary judgment motion was even under consideration, but Linkage raised them only after it lost that motion, and it did so without any accompanying demonstration, or even suggestion, of judicial bias. Nevertheless, Judge King allowed Linkage's motion, as it is his practice to recuse himself from any case in which his former firm is counsel if the opposing party so requests.

Linkage's second-bite tactics succeeded beyond its wildest dreams when the case was reassigned to Judge Volterra, who wasted little time expressing and acting upon his bias against Dr. Silber and the University. On the very day that the parties began to select a jury, Judge Volterra volunteered a number of unsupported, unprovoked and biting criticisms of the University and its president. Taking Linkage's decidedly unproved allegations at face value, he likened the University's re-assertion of control over the BUCEC facility to "Nazi-Gestapo" tactics and then stated that, if the University were going to engage in such tactics, it must "pay the piper." Having prejudged the case, Judge Volterra then attacked Dr. Silber personally. He informed counsel that he had read or

heard that Dr. Silber had stated that "Jews are rigid" (a statement that Dr. Silber never made), and that the judge (who is Jewish) was offended by that. Judge Volterra next accused Dr. Silber (again falsely) of pandering to racists during Dr. Silber's 1990 Massachusetts gubernatorial campaign, and concluded his attack by stating that when Dr. Silber made an appeal to "red necks" (another unfounded accusation), he had lost the judge's support.

The next day, the University moved to recuse Judge Volterra on account of his blatant and admitted bias. In particular, but not exclusively, the University argued that the judge could not possibly sit as an impartial trier of fact on Linkage's Chapter 93A claim.[3] Judge Volterra denied the motion but responded, "[w]ell, I'll make it easy for you. I'll let the jury decide the 93A claim. That's exactly what I'm going to do." But even as he denied the recusal motion, Judge Volterra continued to display his bias, saying that he thought certain unidentified campaign remarks supposedly made by Dr. Silber were "unfortunate," and offering the irrelevant and inappropriate opinion that they should not have been made "by any candidate for governor in a state such as Massachusetts."

Judge Volterra's denial of the University's motion for recusal implied that the judge thought he could suppress his antagonism and prevent it from affecting his performance on the bench. But the very next day, without any warning and less than one-half hour before opening statements, Judge Volterra informed counsel that he had decided to reverse Judge King's grant of summary judgment on Linkage's promissory estoppel claim, and to submit that claim to the jury. Judge Volterra made this decision *sua sponte* — Linkage had never asked him to do so and the parties had never briefed or argued the issue — and he implemented it without explaining why he thought Judge King's decision was wrong, or why he had waited until the trial was about to begin before taking action. In so doing, Judge Volterra usurped the role of an appellate court, revisiting issues about which he was insufficiently informed and which already had been decided by a fully informed judge.

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[3] Under Massachusetts law, a plaintiff is not entitled to a trial by jury under Chapter 93A. *See, e.g., Town of Norwood* v. *Adams Russett Co., Inc.*, 401 Mass. 677, 519 N.E.2d 1115 (1989).

The University vigorously opposed this sudden about-face and requested a stay of the trial pending an appeal. Perhaps realizing how clearly his decision reflected his bias, Judge Volterra backed away. He promised that if the jury returned a verdict for Linkage on the estoppel claim, he would enter judgment notwithstanding the verdict in the University's favor. Again, Judge Volterra failed to explain why he would submit to the jury a claim which he had already decided could not support a plaintiff's verdict.

The trial began. Exhibit 1 was a statement of undisputed facts, prepared jointly by the parties and drawn, in large part, from Judge King's summary judgment decision, which affirmed the heart of the University's position in this lawsuit. Before the trial began, and before he began to display his bias, Judge Volterra had, under the dictates of Rule 56(d) of the Massachusetts Rules of Civil Procedure, approved the joint statement, with only minor modifications, and had agreed that it could be introduced into evidence as Trial Exhibit 1.

Exhibit 1 was a crucial element of the University's case. It enabled the University to streamline its presentation of evidence and — because it *stipulated* that Linkage and the University had never entered into a renewal contract — it assured the University that Linkage had no viable claim for future "expected" profits. Counsel for the University therefore made Exhibit 1 a centerpiece of his opening statement and used it repeatedly during his examination of witnesses, including all of Linkage's key witnesses.

With only three days of testimony remaining in the seven-week trial, Judge Volterra (prompted by Linkage's lawyer) precipitously struck Exhibit 1. The ambush began when Linkage's counsel falsely accused the University of failing to produce certain documents during discovery, arguing that Linkage might have presented these documents to Judge King in an effort to avoid summary judgment.

Linkage's claim was patently false. The documents at issue had been in Linkage's possession all along — in fact, *the University had received them from Linkage in the first place*, as an attachment to Linkage's requests for admission. The University's counsel proved this the next day, and offered to show Judge Volterra the requests for admission, signed by Linkage's counsel and attaching the documents at issue as produced from Linkage's own files. Notwithstanding this prompt and incontrovertible offer of proof, Judge Volterra refused to reconsider his striking of Exhibit 1 or even to review the University's

submission. The judge compounded his error by removing Exhibit 1 from the case in the most prejudicial manner possible: undermining the credibility of the University's lawyer, Judge Volterra instructed the jury "to disregard the matters that were read to you by [the University's counsel] when he read from Exhibit 1."

Having improperly struck Exhibit 1, Judge Volterra immediately — and without any prompting from Linkage — proceeded to drastically reconfigure the landscape of the case. Acting completely *sua sponte*, he reversed several more elements of Judge King's grant of summary judgment to the University. Most importantly, he reinstated Linkage's claims for breach of the alleged renewal contract and for breach of the implied covenant of good faith and fair dealing.

Judge Volterra could not have dealt a harsher blow to the University's defense. For almost seven weeks, the University had tried the case on the basis of a *stipulation*, approved by Judge Volterra himself, certifying as correct Judge King's legal finding that no renewal contract had ever been executed. The University, therefore, justifiably assumed that Linkage could not recover damages for profits it supposedly expected to earn under a renewal agreement. Now, with only three days of trial remaining, Judge Volterra had — for no apparent reason — turned that assumption on its head and resurrected those previously dead claims. However, Judge Volterra once again promised that, if the jury found for Linkage on either of the reinstated contract claims, he would grant the University judgment notwithstanding the verdict. Once again, the judge failed to explain *why* he would reinstate a claim and simultaneously promise not to enforce it.

On July 5, 1994, at the close of Linkage's evidence, and again on July 11, 1994, at the close of the case, the University moved for a directed verdict. The judge denied both motions and sent all counts (including those reinstated during the trial) to the jury. Although the jury determined that the University had not breached the Base Agreement, it did find for Linkage on the remaining claims, including the renewal contract, estoppel, defamation, tortious interference, and Chapter 93A claims.

The University then moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. Judge Volterra initially allowed the j.n.o.v. motion with respect to Linkage's claims for breach of the renewal agreement, breach of the covenant of good faith and fair dealing, and promissory estoppel. Judge Volterra allowed

the jury verdicts, for $1,060,641 on the defamation claim and $280,000 on the tortious interference claim, to stand.

When it came to the Chapter 93A count, which would enable him to impose multiple damages on the University, Judge Volterra had a problem of his own making: he had directly contradicted established Massachusetts law in his instructions to the jury. Chapter 93A, the Massachusetts consumer protection statute, requires that the defendant be engaged in "trade or commerce." The plaintiff always bears the burden of proof on that issue, but Judge Volterra had improperly instructed the jury that *the University* bore the burden of proving that it was *not* engaged in trade or commerce. At a minimum, therefore, the University was entitled to a new trial on the Chapter 93A claim and would undoubtedly get one on appeal. Judge Volterra realized that he could not let the jury's Chapter 93A verdict stand but, rather than grant the University a new trial, he broke his promise to leave the Chapter 93A count entirely in the jury's hands and instead decided the Chapter 93A claim himself. Not surprisingly, Judge Volterra found both that the University was liable under Chapter 93A and that it had acted in a knowing and willful manner. This allowed him to double the Chapter 93A damages and order the University to pay Linkage's costs and attorneys' fees.

Ultimately, an amended judgment, for $5,667,825.04 (exclusive of interest), was entered even though Linkage's profits were only $16,678 during calendar year 1988, only $30,711 during calendar year 1989, only $54,141 during calendar year 1990, and were estimated to be only $9,000 for the half-year ending on July 31, 1991.

In calculating that judgment, Judge Volterra broke another promise: not to give effect to the jury's findings on the reinstated promissory estoppel claim. Although he initially granted the University judgment notwithstanding the verdict on that claim, he nevertheless used the jury's award of promissory estoppel damages to calculate the Chapter 93A damages, giving Linkage all the benefits of an estoppel claim that he had already ruled could not support a plaintiff's verdict. When the University, in a motion to amend the judgment, pointed out this obvious inconsistency, which was fatal to Linkage's case, Judge Volterra reneged once again: he *reversed his own j.n.o.v. ruling* on the promissory estoppel claim and reinstated the jury's verdict on that claim in favor of Linkage.

The University subsequently appealed from the amended judgment entered by the trial court and requested direct appellate review

by the Supreme Judicial Court. That request was granted on December 21, 1995. Linkage cross appealed, challenging those portions of the trial court's ruling granting the University's motion for judgment notwithstanding the verdict.

D. *The Supreme Judicial Court Of Massachusetts's Decision*

On appeal, the Supreme Judicial Court disregarded its own long-standing precedent according charitable institutions special status for the purpose of preventing the dissipation of scarce charitable resources. Specifically, the Supreme Judicial Court deprived the University of equal protection of the laws under the Fourteenth Amendment in contradiction to its own precedent exempting similarly situated charitable institutions from Chapter 93A liability. Moreover, by selectively applying Chapter 93A, the Supreme Judicial Court, in conflict with the decisions of the United States Supreme Court, violated the University's First Amendment right to choose who shall teach and what and how it shall be taught, and, as a result, set a precedent which threatens the identical First Amendment rights of every other educational institution in the Commonwealth and the nation. Finally, although the Supreme Judicial Court rectified certain errors committed by the trial court, it failed to recognize that Judge Volterra's admitted bias, coupled with his precipitous decisions to reverse Judge King and to strike Exhibit 1, and his wrongful reinstatement of the estoppel and renewal claims, had deprived the University of its due process right to a fair trial. The Supreme Judicial Court compounded the due process violation by ignoring the undisputed evidentiary record — which confirmed that Linkage would have earned little, if any, profit — and by arbitrarily reinstating the jury's grossly excessive $2.1 million verdict on Linkage's contract renewal claim, and then doubling that amount pursuant to Chapter 93A. This enormous judgment which, with interest, exceeds the annual budgets of Boston University's English, history and philosophy departments *combined*, has no rational evidentiary basis. The due process violations from which it arose are therefore especially severe because they adversely affect the many students, faculty, researchers, and others who are the beneficiaries of charitable organizations nationwide.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME JUDICIAL COURT'S SELECTIVE APPLICATION OF MASSACHUSETTS GENERAL LAWS CHAPTER 93A DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT (1) PROHIBITING THE UNEQUAL APPLICATION OF LAWS BASED SOLELY ON ARBITRARY AND IRRATIONAL CONSIDERATIONS AND (2) REJECTING LAWS THAT ABRIDGE A UNIVERSITY'S FIRST AMENDMENT RIGHT TO CHOOSE WHO SHALL TEACH, WHAT SUBJECTS SHALL BE TAUGHT AND HOW THEY SHALL BE TAUGHT

The Supreme Judicial Court's arbitrary application of Massachusetts General Laws Chapter 93A to the University, where the court previously has exempted similarly situated charitable institutions, directly conflicts with and flouts the decisions of the United States Supreme Court and the federal Courts of Appeals prohibiting the unequal application of the laws. The Equal Protection Clause "requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose." *Sylvia Development Corp.* v. *Calvert County, Maryland*, 48 F.3d 810, 818 (4th Cir. 1995). Thus, "the essential command of the Equal Protection Clause has always been that the classification of persons [to] which a law applies must be 'reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" *Id.* (*quoting F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 425 (1920)). Put simply, "'all persons similarly circumstanced sh[ould] be treated alike.'" *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982) (*quoting F.S. Royster Guano*, 253 U.S. at 415).[4] Because the Supreme Judicial Court acted in conflict with these constitutional precepts and in direct conflict with the Supreme Court's instructions, and because the court failed to point to any

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[4] The fact that this case involves judicial action rather than legislative action is of no moment. The "Equal Protection Clause limits *all* state action, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations." *Sylvia Development*, 48 F.3d at 818 (emphasis in original).

difference having a fair and substantial relation to the object of the Chapter 93A legislation, the verdict cannot stand.

The Supreme Judicial Court's opinion in this case marks a watershed event: for the first time, a Massachusetts court has applied Chapter 93A, the Commonwealth's consumer protection statute, to a charity's core activity, in this case, education. The opinion stands in stark contrast to the deference both federal and state courts and both the Congress and state legislatures ordinarily accord to charitable institutions, including, for example, exemption from taxation, limitations on tort liability, and preferential financing alternatives. The opinion not only denies the University the equal protection of the laws guaranteed by the United States Constitution, it allows Chapter 93A to be applied to charitable educational institutions on the basis of a subjective, undefined and unpredictable test of whether an institution's educational offerings or charitable works are acceptable or desirable to a particular judge. This places scarce charitable dollars, including contributions of individuals and charitable foundations, and students' tuition payments, at new and unwarranted risk.

In pertinent part, Massachusetts General Laws Chapter 93A, § 2 provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce* are hereby declared unlawful" (emphasis added). To determine whether a party engages in trade or commerce, the courts consider several factors, including (1) the nature of the transaction; (2) the character of the parties and their activities; and (3) whether the transaction was motivated by business or personal reasons. *Begelfer* v. *Najarian*, 381 Mass. 177, 191, 409 N.E.2d 167, 176 (1980).

The Supreme Judicial Court, in conflict with the entire body of its prior decisions, has only in the Boston University case held that a charitable organization undertaking activities directly furthering its core mission was engaged in trade or commerce. Indeed, in rendering the decision at issue here, the Supreme Judicial Court recognized that it was setting a dangerous precedent, stating that "[i]n most circumstances, a charitable institution will not be engaged in trade or commerce when it undertakes activities in furtherance of its core mission." (App. 32a.) But the Supreme Judicial Court never explained how the circumstances here were different enough to justify imposing Chapter 93A liability on Boston University.

Nor did the court offer any guidance as to what charitable activities will run afoul of this arbitrary dividing line in the future.

That would have been an impossible task. The Supreme Judicial Court is in conflict with its decisions exempting charitable corporations from Chapter 93A liability even for *commercial* activities so long as the commercial activity at issue was "incidental" to the institution's charitable function. In *All Seasons Services, Inc.* v. *Commissioner of Health & Hosps. of Boston*, 416 Mass. 269, 271, 620 N.E.2d 778, 780 (1993), for example, the defendant hospital had solicited bids to operate vending machines and a canteen in the hospital. After the hospital awarded the contract to the company which offered to pay the most for the right to manage the concessions, another company sued, alleging, *inter alia*, that the hospital had violated Chapter 93A in connection with the award of the contract. In determining that the hospital could not be held liable for violating Chapter 93A, the Supreme Judicial Court ruled that because the vending contract was "incidental" to the hospital's charitable function, "the hospital was not a 'person' engaged in 'trade or commerce,' within G.L. c. 93A § 11 . . . ." *Id.* at 271-72, 620 N.E.2d at 779-80.

This case cannot be harmonized with *All Seasons*. The Supreme Judicial Court acknowledged that the activities at BUCEC were educational and, therefore, part and parcel of the core mission of the University (App. 33a, n.36). Indeed, the Base Agreement itself commanded Linkage to use its "best efforts to ensure that BUCEC fulfills the educational mission and goals of the University." The court in *All Seasons* held that the broad exemption from Chapter 93A extended even to situations where the charitable organization engaged in activities that were *commercial*, so long as the commercial activity was incidental to the organization's charitable purpose. The necessary implication of the Supreme Judicial Court's decision in *All Seasons* is that a charitable organization pursuing its core mission is *not* subject to Chapter 93A.

The University hired Linkage to help it carry out the University's core mission: education. That fact cannot be denied, and it confounds any effort to justify the Supreme Judicial Court's decision.

Ignoring its prior decisions, the Supreme Judicial Court held that the University's relationship with Linkage fell into a "business context" because of the University's prudent desire to ensure that

the educational activities conducted at BUCEC generated revenues sufficient to meet the costs of acquiring and operating the facility. This analysis is irrational and inadequate, for all colleges and universities — indeed, all charitable institutions — owe a fiduciary obligation to keep these financial considerations in mind in all their operations. To penalize an institution simply for minding its costs and revenues is to insulate profligate charities from Chapter 93A liability, while exposing those that seek to control their costs and maximize their charitable efficiency.

The Supreme Judicial Court's opinion makes it clear that the court disapproved of the University's actions in terminating its relationship with Linkage. But such concerns about the University's conduct *after* the relationship with Linkage was formed should have had nothing to do with the court's determination of the legal status of BUCEC *at the time that relationship was created.* By adopting an *ex post facto*, result-oriented analysis, the Supreme Judicial Court has penalized the University for pursuing its educational mandate at BUCEC. Because the University's contract with Linkage was in furtherance of that mission and indistinguishable from similar agreements entered into by charitable institutions across the Commonwealth, the Supreme Judicial Court's inconsistent application of Chapter 93A violated the University's right to equal protection. More troubling, however, is the fact that the Supreme Judicial Court's opinion permits courts to subjectively sanction some charitable institutions and not others for the *same* conduct. That threatens the equal protection rights of *all* charitable institutions.

The Supreme Judicial Court's selective and unequal application of the laws also conflicts with the decisions of the Supreme Court upholding the right to academic freedom, a conflict which raises another, perhaps even more troubling, constitutional issue. Every university's right of academic freedom is guaranteed under the First Amendment. As this Court has recognized, "'the four essential freedoms of a university [are] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1956) (Frankfurter, J., concurring in result).

By arbitrarily punishing the University based solely upon a choice the University has made concerning *how* to educate, the Supreme Judicial Court infringed on the University's academic freedom under the First Amendment to determine who shall teach, what

subjects shall be taught, and how they shall be taught. Indeed, by claiming that *most* educational institutions will be exempt from regulation under Chapter 93A, but refusing to exempt the same educational curricula merely because it is denoted as "corporate education," the Supreme Judicial Court has, in direct conflict with the decisions of the Supreme Court, impermissibly decided for itself what academic courses are worthy of protection, and what courses are not. By singling out Boston University's corporate education programs for disparate treatment, the Supreme Judicial Court's opinion violates the University's right to academic freedom, a right duly recognized and accorded deep respect by the Supreme Court:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.'

Keyishian v. *Board of Regents*, 385 U.S. 589, 603 (1967). The Supreme Judicial Court is free to apply the laws *equally* to colleges and universities, but it is not free to pick and choose which courses, offered by which colleges, shall be exempted from trade regulation, penalizing one disfavored institution or course of study while protecting others.

"Academic freedom thrives . . . on autonomous decisionmaking by the academy itself." *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214, 226 n.12 (1985). The Supreme Judicial Court's decision in conflict with this ruling robs Boston University, and by extension every university in the Commonwealth, of that essential autonomy, and ushers in a new regime under which colleges will establish curricula, and other charities will dispense benefits, at their peril, always fearful that a judge will someday disapprove of their choices and, using the Supreme Judicial Court opinion here as a license, give effect to that disapproval through a Chapter 93A judgment with devastating financial consequences. In that crucial sense, the Supreme Judicial Court decision is not just an

insult and an injury to Boston University, but a threat to the autonomy of all charitable institutions in Massachusetts and the nation.

II. THE SUPREME JUDICIAL COURT'S FAILURE TO CORRECT THE RESULTS OF JUDGE VOLTERRA'S ADMITTED BIAS, IN CONFLICT WITH ITS OWN STANDARDS AND THOSE OF THE FEDERAL COURTS OF APPEALS AND THIS COURT, VIOLATED THE UNIVERSITY'S CONSTITUTIONAL RIGHT TO DUE PROCESS

Although challenged by the University to redress the denial of due process caused by Judge Volterra's biased, irrational and unsupportable conduct, the Supreme Judicial Court took no steps to examine the record or to respond to the specific, troubling incidents cited by the University. Instead, the Supreme Judicial Court, without discussion or analysis, summarily concluded that the judge's conduct was unbiased. On the undisputed factual record, this summary affirmance and acceptance of the trial court's conduct and rulings conflict with the decisions of the Supreme Court and the federal Courts of Appeals holding that due process requires that a litigant receive a fair trial before an impartial tribunal.

Indeed, Judge Volterra's *expressions* of bias from the bench mandated his recusal, and his refusal to withdraw — in contrast to Judge King's punctilious avoidance of the slightest hint of impropriety — was itself legally indefensible and a violation of the University's right to due process. When coupled with his punitive *actions*, Judge Volterra's bias transformed the litigation into a proceeding with a preordained outcome, inimical to the foundation of our Constitution, that we are a "country of laws, not of men." The University asked the Supreme Judicial Court to confirm that the process received could not substitute for the process that was due.

The Supreme Judicial Court inexcusably failed to apply its own controlling precedent requiring recusal not only for actual bias but under circumstances where the judge's impartiality might reasonably be questioned. Given Judge Volterra's personal animus against Dr. Silber — in particular the Judge's admission that he thought Dr. Silber harbored both racist and anti-Semitic views, which the Judge admitted offended him — the conclusion that Judge Volterra's impartiality might reasonably be questioned is utterly inescapable.

The Supreme Judicial Court's failure to overrule the decisions of this biased judge is in conflict with well-established law and, in particular, with decisions of the federal Courts of Appeals. Therefore, Boston University respectfully submits that a writ should issue, not merely to redress a wrong visited upon the University, but to reaffirm that the interests of justice for all citizens and institutions cannot be served by a biased tribunal.

The financial consequence of the Commonwealth's highest court's failure to correct the award of such huge judgments at the hands of a capricious court is especially acute for educational institutions that depend heavily upon donations, government funds and student tuition for revenue. For many years the states and the federal government have provided a host of protections — such as exemption from real estate and income taxation, partial immunity from tort liability, tax deductions for charitable contributions — designed to conserve the scarce resources of public and private universities and other charitable organizations. Donors expect their gifts to support education, not gargantuan civil judgments. The decision of the Supreme Judicial Court, however, puts donors (whether individuals or foundations), students, academics (and, to be sure, potential plaintiffs) on notice that the judicial system is arbitrary and that educational funds are at risk (or ripe for the taking) depending upon the judge who presides. To a university struggling to fund ambitious and expensive research programs in medicine and technology, build new dormitories, and recruit and retain first-class faculty, a denial of due process resulting in an irrationally massive money judgment is not only demoralizing but also deals a crippling fiscal blow. Unless it is overturned by this Court, the Supreme Judicial Court's decision will be cited by plaintiffs nationwide to justify all manner of legal assaults on non-profit entities.

A. *The Supreme Judicial Court's Failure To Order A New Trial In Light Of Judge Volterra's Admitted Bias Conflicts With Controlling Law In The Federal Courts of Appeals And The United States Supreme Court, And Raises An Important Constitutional Due Process Issue Which Should Be Settled By This Court*

Judge Volterra expressed his extreme bias against the University and Dr. Silber on the first day of jury selection, and gave effect to

that bias throughout the trial and beyond. His actions so deeply compromised his impartiality — in appearance and in fact — that his refusal to withdraw violated the University's right to due process.

Aside from simply noting that Judge Volterra himself had decided both that he was not biased and that others could not reasonably question his impartiality, the Supreme Judicial Court's entire analysis of the bias issue consisted of the following single sentence:

> We are satisfied that the Judge did not harbor any personal bias against either Silber or Boston University, and that no other impediment existed that might require the Judge to step aside.

(App. 16a.) Although the Supreme Judicial Court thus stated its view that it was satisfied that Judge Volterra did not harbor any actual bias against either Dr. Silber or Boston University, it evaded the second step of the test: an objective appraisal of whether this was a proceeding in which the judge's impartiality might reasonably be questioned by others. *Haddad* v. *Gonzalez*, 410 Mass. 855, 862, 576 N.E.2d 658, 662-63 (1991). The Supreme Judicial Court's own rules make it clear that circumstances where a judge's impartiality might reasonably be questioned include instances where the judge has a personal bias or prejudice concerning a party. *Id.* (citing SJC Rule 3:09, Canon 3(C)(1)(a)).

In affirming Judge Volterra's decision, the Supreme Judicial Court was in direct conflict with decisions of this Court and those of the federal Courts of Appeals. "'[O]ur system of law has always endeavored to prevent even the probability of unfairness. . . .'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (*quoting In re Murchison*; 349 U.S. 133, 136 (1955)). "Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system." *Lewis* v. *Curtis*, 671 F.2d 779, 789 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982). Thus, "[i]t has long been recognized that freedom of the tribunal from bias or prejudice is an essential element of due process. . . ." *United States* v. *Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976).

In light of these fundamental principles, a judge is obligated to recuse himself even if there is no more than the appearance of bias. Accordingly, "[t]he Due Process Clause 'may sometimes bar trial

by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986) (*quoting Murchison*, 349 U.S. at 136). *See also Walberg* v. *Israel*, 766 F.2d 1071, 1076 (7th Cir.) ("Even when the biased judge neither is the trier of fact nor is shown to have conveyed his bias to the jury . . ., there can be a violation of due process which requires a reversal . . ."), *cert. denied*, 474 U.S. 1013 (1985); *United States v. Bertoli*, 40 F.3d 1384, 1412 (3d Cir. 1994) ("The judge does not have to be *subjectively* biased or prejudiced, so long as he appears to be so") (emphasis in original) (quoting *Liteky* v. *United States*, 510 U.S. 540, 553 n.2 (1994)); *In re Larson*, 43 F.3d 410, 415 (8th Cir. 1994) (if a "reasonable man . . . would harbor doubts about the judge's impartiality", the judge must recuse himself) (quoting *Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980)); *United States* v. *Antar*, 53 F.3d 568, 576 (3d Cir. 1995) ("In determining whether a judge had the duty to disqualify him or herself, our focus must be on the reaction of the reasonable observer. If there is an appearance of partiality, that ends the matter"); *In re Sam M. Antar*, 71 F.3d 97, 99 (3d Cir. 1995) (trial judge should have recused himself when "reasonable observer" could interpret judge's comments as evidencing bias).

One need not look outside this lawsuit for a splendid illustration of those principles in action. Judge King's conduct during the pretrial stages was impeccable. Linkage never questioned his impartiality, and asked him to withdraw only after it lost an important summary judgment motion. Judge King could have rejected that request as the sheer opportunism it was, but he did not: although he was not partial in appearance or fact, he withdrew from the case in order to preserve the court's integrity beyond any possible doubt.

Entirely absent from the Supreme Judicial Court's opinion, however, is any discussion (or recognition) of the careful consideration Judge King gave to the recusal question, and the steps he undertook to ensure that there would be no appearance of impropriety. Notwithstanding the stark contrast between Judge King's careful, considered conduct and Judge Volterra's refusal to step down even after displaying, and then acting out, his hostile, unconditional and unrepentant bias, the Supreme Judicial Court took no steps to analyze, or even acknowledge, the due process violations implicated. Judge Volterra's unfounded accusations of fascism, racism

and anti-Semitism — based, by the judge's own admission, entirely on hearsay — compelled the University to move for recusal, not out of opportunism and not because of the possibility of an *appearance* of bias, but because of Judge Volterra's admitted *actual* bias. Yet this fact received absolutely no consideration from the Supreme Judicial Court.

The Supreme Judicial Court's failure to act is all the more troubling insofar as the University's concerns were well-founded. Immediately after he denied the recusal motion, Judge Volterra began to act on his bias, and he continued to act on it to ensure a judgment adverse to the University and an inflated award of damages. Among other things, and as described in more detail above: (1) he resurrected Linkage's dead estoppel claim, *sua sponte* and without explaining why he felt entitled to effectively usurp the appellate function and sit in review of Judge King's summary judgment ruling; (2) he struck Trial Exhibit 1, the cornerstone of the University's defense, based solely on a demonstrably false accusation by Linkage's attorney, and then refused even to *look at* the University's proof of its innocence; (3) he resurrected Linkage's contract renewal claims, again assuming an appellate role *sua sponte* and without explanation, at the eleventh hour, when it was far too late for the University to adjust its trial strategy to this drastic change of circumstances; (4) he evaded the consequences of his own erroneous jury instruction on the Chapter 93A claim by reneging on his promise to let the jury decide that claim; (5) he erroneously included the jury's award of promissory estoppel damages in his calculation of damages under Chapter 93A, even though he had given the University judgment notwithstanding the verdict on the estoppel claim; and (6) when confronted with that error, he reversed his own j.n.o.v. ruling (and thereby reneged on another promise to the University), and reinstated the jury's unsupportable estoppel verdict in Linkage's favor. These issues were fully briefed and squarely raised by the University. Yet the Supreme Judicial Court ignored Judge Volterra's extremely biased conduct and, in so doing, rendered a decision in direct conflict with the decisions of the Supreme Court regarding the requirements of due process.

But that was not all the Supreme Judicial Court ignored. Having obtained a judgment that satisfied his bias, Judge Volterra plainly attempted to cover his tracks. As the University pointed out to the Supreme Judicial Court, Judge Volterra's written decision on the

Chapter 93A claim was a masterpiece of self-serving revisionism. To "justify" snatching the Chapter 93A claim from the jury, for example, Judge Volterra claimed that "the court's statements that 'the jury [will] decide the 93A claim,' did not specify whether the jury's decision would be binding or advisory."

This was incredible. Judge Volterra could not, and did not even try to, explain how the words "I'll let the jury decide the 93A claim" could mean anything other than that the jury — and not the judge — would be the trier of fact. Indeed, Judge Volterra's entire discussion in this regard was at best a half-truth. While purporting to set forth the reasons why he and not the jury had decided the Chapter 93A claim, his decision failed to disclose why the jury was given the matter in the first place: because Judge Volterra could not deny that he lacked the impartiality needed to be a trier of fact. Judge Volterra's decision omits any reference to the University's motion to recuse and, therefore, conceals the crucial fact that the motion was made in response to Judge Volterra's verbal attacks on the University and its president, and that the judge's promise to let the jury decide the Chapter 93A claim was a direct result of that motion. The Supreme Judicial Court completely ignored these undisputed facts.

The University also demonstrated to the Supreme Judicial Court that the Chapter 93A decision was legally flawed, internally inconsistent, laced with gratuitous *ad hominem* attacks on the University's president,[5] and also distorted the factual record to reach a preordained result. For example, *although Judge Volterra found that Linkage had taken the University's property* (the evidence allowing no other conclusion), he called this taking a justified "defensive" reaction to the University's termination of Linkage's contract and the hiring of a number of Linkage's employees. What the judge failed to note, however, is that the termination and hiring did not occur until *after*, and occurred only *because* of, Linkage's taking of property.

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[5] In his Chapter 93A findings, for example, Judge Volterra referred to the University as acting "in a manner reminiscent of how a military junta of a banana republic would stage a *coup d'etat* . . . ." Likewise, Judge Volterra termed the dispute between Linkage and the University as "a classic example of the perils of micromanagement by a chief executive, such as President Silber . . . ." Given the amount of money the University had at stake in the contract, the case was one of *macro*management which any chief executive would have been seriously remiss to ignore.

Linkage's action was not, and could not have been, a reaction to something that had not yet occurred.

Had the Supreme Judicial Court properly examined the record, the court could not possibly have written the opinion it did absent a conscious decision to whitewash the whole proceeding. *This* Court, however, cannot ignore the Supreme Judicial Court's failure to address or even discuss how Judge Volterra's bias infected the trial and denied the University its due process rights. Because of the Supreme Judicial Court's failure, the entire judgment entered against the University is tainted and must be reversed. *See Knapp* v. *Kinsey*, 232 F.2d 458, 465 (6th Cir.) ("if [the] basic principle [that a litigant is entitled to a fair trial] is violated, the judgment must be reversed"), *cert. denied*, 352 U.S. 892 (1956).

B. *The Failure Of The Supreme Judicial Court To Overturn Judge Volterra's Unjustified Exclusion Of Trial Exhibit 1 Also Deprived The University Of Its Due Process Right To A Fair Trial*

Judge Volterra's last-minute disposal of Trial Exhibit 1 was also, in and of itself, a deprivation of due process which the Supreme Judicial Court failed to correct. The pretext for Judge Volterra's action was a patently false accusation by Linkage's attorney, and in his rush to impose a crippling sanction on the University Judge Volterra not only failed to demand supporting evidence from Linkage but refused even to consider the incontrovertible proof that exonerated the University and exposed Linkage's mendacity.

The Supreme Judicial Court, having ignored Judge Volterra's bias, similarly ignored the profound importance of the Rule 56(d) stipulation of key facts embodied in Exhibit 1, concluding that "neither Boston University's reliance on Exhibit 1, nor the timing of the plaintiff's motion to strike, substantially altered the defense of the case." (App. 17a-18a). The Supreme Judicial Court's failure to appreciate that Judge Volterra's act likely changed the outcome of the case and thus infected the trial with fundamental unfairness constitutes a violation of the University's due process rights in direct conflict with decisions of this Court.

The blow Judge Volterra inflicted by striking Exhibit 1 was crippling. Had the judge never admitted Exhibit 1 into evidence,

had he told the parties from the outset that the facts stated in it were disputed and would have to be proved or disproved at trial, the University could have set its trial strategy accordingly. It could, as a prime example, have demonstrated to the jury's satisfaction — as it had already demonstrated *beyond dispute* to Judge King — that the supposed "renewal contract" was a fiction because the University's negotiator, Joseph Meng, lacked authority to execute a contract, and because Linkage's negotiator, Phillip Harkins, knew that Meng had no such authority.

Instead, Judge Volterra withdrew Exhibit 1 *after* the University's counsel had told the jury, time after time over several weeks, that these crucial facts were undisputed, and *after* the key witnesses had completed their testimony. By refusing to grant the University's motion for a mistrial, and by instructing the jury to disregard the repeated representations made by the University's counsel throughout the trial, Judge Volterra effectively destroyed University counsel's credibility with the trier of fact.

Indeed, the effect on the University's defense was devastating. Judge Volterra's actions effectively imposed the judge's bias on the jury, caused the jury to find a renewal contract where none in fact existed and enabled the Supreme Judicial Court to use that unsupportable jury finding to impose a damage award of $2.1 million for "breach" of the illusory renewal contract.

In failing to overturn Judge Volterra's decision, the Supreme Judicial Court came in conflict with the principle affirmed by the United States Supreme Court and the federal Courts of Appeals that the right to due process under the Fourteenth Amendment is violated when a court takes action that constitutes "highly prejudicial error — one quite likely to have changed the outcome, and thus to have infected the trial with fundamental . . . unfairness." *Johnson* v. *United States*, 805 F.2d 1284, 1290 (7th Cir. 1986). *See also Roberts* v. *City of New York*, 295 U.S. 264, 277 (1935) (the right to due process is violated when there is an error that is "gross and obvious, coming close to the boundary of arbitrary action"); *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269, 273 (1926) (the right to due process is violated if "the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'") (*quoting Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878)).

Judge Volterra's precipitous striking of Exhibit 1 was both arbitrary *and* prejudicial. Had he listened to the facts — instead of ignoring evidence properly offered by the University — he could never have made the decision to strike this crucial document. And had he not made that devastating decision, a large part of the judgment against the University could never have been imposed or allowed to stand. If due process demands anything at all, it must demand more than the University received at the hands of Judge Volterra. The Supreme Judicial Court's failure to consider the impact of Judge Volterra's actions, and address the constitutional violations caused by his precipitous acts, deprived the University of its Fourteenth Amendment right to a fair trial.

C. *The Supreme Judicial Court's Approval Of The Wholly Unsupported And Grossly Excessive Damages Awarded On The Contract Renewal Claim Likewise Offends Fundamental Notions Of Due Process*

The Supreme Judicial Court's summary approval of Judge Volterra's prejudicial conduct, which took monetary form in the damage award against the University, violated the University's right to due process. The jury, inflamed by the judge's patent bias, set out not to compensate Linkage, but to punish the University. The most outrageous aspect of its excessive verdict was its award of $716,000 per year, or $2,148,000 in total, for "lost profits" on Linkage's contract renewal claim. Whether the result of a negligent or conscious disregard of an evidentiary record entirely undercutting such a gargantuan verdict, the Supreme Judicial Court reinstated this award, and then rendered it even more punitive by *doubling* it under Chapter 93A.

In rendering this arbitrary and punitive award, the Supreme Judicial Court completely ignored the undisputed facts that Linkage barely turned a profit from the Base Agreement and predicted only nominal gains for the future. Under any rational analysis of the alleged renewal contract, Linkage's "profits" could only have equaled the difference between (a) Linkage's fixed management fee, and (b) the expenses Linkage incurred rendering performance.

The alleged renewal contract, which Linkage introduced at trial, established the revenue side of the equation: a fixed $3,118,000 fee for the first year of service. Linkage's own officers provided the

expense side of the equation. They testified that Linkage's expenses consisted of (a) direct operating expenses plus (b) the payroll costs for Linkage's employees. Linkage's own business plan — a document Linkage prepared *before* litigation commenced — projected these expenses to be $1,524,000 and $1,648,000, respectively, for a total of $3,172,000.

Thus, Linkage's own evidence proves that Linkage expected to *lose* money — about $54,000 — in the first year of the renewal contract. This was consistent with Linkage's past performance. The company's own tax returns showed that Linkage never earned more than $54,000 in any year of its corporate existence, and its own *pro forma* income statement projected a mere $9,000 profit for the last half-year of the Base Agreement. This evidence was completely and patently inconsistent with the astronomical profit of $716,000 per year calculated by the jury and reinstated and doubled by the Supreme Judicial Court.

How did the Supreme Judicial Court give its approval to, and then double, such an incredible award? First, by misinterpreting the agreement that was the only possible source of Linkage's alleged lost profits. In the single footnote to which it relegated its discussion of damages, the Supreme Judicial Court blithely concluded that the $716,000 per year lost profits figure awarded by the jury "was, if anything, a conservative approach, considering the rapid growth in revenues during the first three years of the base agreement and the ambitious plans to expand programs both at the BUCEC site and in other cities." (App. 35a, n.38.)

This statement shows that the Supreme Judicial Court either completely misunderstood or chose to overlook the express terms of the agreement. Linkage never received any *BUCEC revenues*, but rather was paid — and if the renewal contract existed, was to be paid in the future — a *fixed fee* for its services. The growing revenues to which the Supreme Judicial Court referred had been generated by the University's *own* programs, not by the programs developed by Linkage. They had nothing to do with Linkage's fixed contractual fees or its prospective profits.

The Supreme Judicial Court also found support for the jury's ridiculous award in the comments at trial of Linkage's president and chief financial officer. Each of them predicted that Linkage — which had eked out 3 to 7 percent profit margins under the Base Agreement — would somehow earn an unprecedented 20 percent

profit margin during the term of the renewal contract. In crediting this self-serving testimony, admitted into evidence over the University's vigorous objections, the Supreme Judicial Court ignored its own precedent: in *Augat, Inc.* v. *Aegis, Inc.*, 417 Mass. 484, 489, 631 N.E.2d 995, 998 (1994), the Supreme Judicial Court had held that post-litigation profit projections from interested parties cannot serve as a basis for the award of damages. *See also BBF, Inc.* v. *Germanium Power Devices Corp.*, 13 Mass. App. Ct. 166, 176 n.9, 430 N.E.2d 1221, 1227 n.9, *review denied*, 385 Mass. 1003, 441 N.E.2d 1043 (1982).

The "20 percent margin" testimony was patently belied by the undisputed facts. To achieve a 20 percent margin on a $3,118,000 fee, Linkage would have had to keep its annual expenses down to less than $2.5 million. As noted, those expenses had two basic components: (1) program operating expenses and (2) Linkage's payroll. Linkage's own business plan revealed, however, that Linkage expected its operating expenses for the upcoming year to be $1,524,000. The company's actual payroll expenses for the *previous* year had been $1,320,000, and under the alleged renewal agreement Linkage would have incurred additional payroll costs — of about $325,000 per year, according to Linkage — for operation of another program. Thus, anticipated operating and payroll expenses alone would have totaled some $3,200,000. Subtracting these expenses from the entire $3,118,000 fee anticipated by Linkage, one finds that in the first year of the renewal Linkage would have operated at a loss of $82,000.

The 20 percent margin, in other words, was a chimera, an outright fabrication. Linkage's own evidence proved that the parts of its damage equation could not possibly equal the whole, that Linkage could not have reduced its annual costs below $2.5 million and, therefore, could never have generated the excessive "lost profits" awarded by the jury.

Although the Supreme Judicial Court recognized that the evidence must afford a "basis for a reasonable judgment," *Galvin* v. *Nutting-Pillman Amusement Co.*, 284 Mass. 314, 315, 187 N.E. 360 (1933), it nevertheless permitted this arbitrary, imaginary, and excessive award to enter. That decision was not just legally improper; it was constitutionally defective.

Even assuming, *arguendo*, that Boston University was a tortfeasor, the Supreme Court has held that "[t]he Due Process Clause of

the Fourteenth Amendment prohibits a State from imposing a "'grossly excessive"' punishment on a tortfeasor." *BMW of North America* v. *Gore*, 517 U.S. __, 116 S.Ct. 1589, 1592 (1996) (*quoting TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (and cases cited therein)). In imposing a grossly excessive punishment on Boston University, the Supreme Judicial Court acted in clear violation of this decision of the Supreme Court. Even in cases where punitive damages are appropriate, the "punitive award may not be 'wholly disproportionate to the offense . . . .'" *BMW*, 517 U.S. at __, 116 S.Ct. at 1599 (*quoting St. Louis, I.M.S.&R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)). For a punitive award to pass constitutional muster, the damages awarded must have some *reasonable relationship* to the actual harm incurred. *Cf. Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991) (wherein the damages award was affirmed because there were assurances that "the punitive damages . . . are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"). By awarding Linkage nearly $2.5 million, and then doubling that amount under Chapter 93A, and awarding Linkage $900,000 in attorneys' fees for pre-trial and trial work, and over $500,000 in attorneys' fees on appeal, the Supreme Judicial Court has shown a total lack of restraint and completely ignored this constitutional proscription and the clear decisions of the Supreme Court.

In determining whether damages are punitive, this Court has counseled that:

> [w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

Pacific Mutual, 499 U.S. at 18. Stated another way, the award of punitive damages must be "exercised within reasonable constraints" in order to satisfy due process. *Id.* at 20.

In this case, the jury returned a verdict that could not rationally be supported by the evidence. Linkage forecast earnings of only $9,000 in its last half-year of performance under the Base Agreement, and had offered no evidence to explain how, under the renewal agreement, it might ever have been able to increase its profits eighty times over — *i.e.*, to the level of the damages it was ultimately awarded. The multimillion dollar verdict could only have been intended to punish the University. On appeal, the Supreme Judicial Court was duty-bound not to enforce the jury's disproportionate and punitive verdict. But the Supreme Judicial Court instead arbitrarily reinstated the award without any consideration of the evidence, and then *doubled* it. Had the Supreme Judicial Court actually confronted the evidentiary record developed at trial, the court could not rationally have concluded that the parties agreed to a renewal of the Base Agreement, or have explained or justified the affirmance of such an outrageous award. By failing to address the evidence, the decision compounded the punishment and deprived the University of its constitutional rights.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari to review the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respectfully submitted,

TRUSTEES OF BOSTON UNIVERSITY

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APPENDIX A.

425 Mass. 1

LINKAGE CORPORATION vs.
TRUSTEES OF BOSTON UNIVERSITY.

SJC-07113

SUPREME JUDICIAL COURT OF MASSACHUSETTS

425 Mass. 1; 679 N.E.2d 191

December 2, 1996, Argued

May 15, 1997, Decided

PRIOR HISTORY:

Suffolk. Civil action commenced in the Superior Court Department on July 11, 1991. A motion for partial summary judgment was heard by Patrick J. King, J., and the case was tried before Guy Volterra, J. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Existing judgments vacated and judge will enter a single judgment in keeping with conclusions reached in this opinion. Judgment entered on March 28, 1995, and supplemental judgment entered on April 12, 1995, vacated. Order granting Boston University judgment notwithstanding verdict on jury's findings that a renewed agreement was in effect and had been violated vacated, and jury's findings on that claim reinstated. A new judgment to enter awarding Linkage damages, together with attorney's fees, costs, and interest, in ac-

cordance with this opinion, particularly Part 6. Order denying Boston University's motion for new trial affirmed.

SYLLABUS: Judge. Practice, Civil, Disqualification of judge, Summary judgment, Verdict. Contract, Performance and breach, Interference with contractual relations, Promissory estoppel. Agency, Scope of authority or employment, Ratification. Estoppel. Damages, Consumer protection case. Libel and Slander. Consumer Protection Act, Unfair or deceptive act, Trade or commerce, Businessman's claim, Damages. Corporation, Non-profit corporation.

COUNSEL: Michael S. Gardener (John F. Sylvia & Susan M. Finegan with him) for the defendants.

Peter C. Knight (Hunter O'Hanian & Thomas M. Elcock with him) for the plaintiff.

Philip Burling for Newbury College & others, amici curiae, submitted a brief.

JUDGES: Present: Wilkins, C.J., Abrams, Lynch, O'Connor, & Greaney, JJ.

OPINION BY: GREANEY

GREANEY, J. This dispute arises out of an agreement between Linkage Corporation (Linkage) and Boston University that called for Linkage to create and provide educational, training, and other programs of a technical nature at a satellite facility owned by Boston University. Linkage claims that the agreement was renewed by Boston University and then unlawfully terminated; Boston University claims that the agreement was lawfully terminated and never renewed. Linkage stated its case in the Superior Court by means of a tencount com-

plaint, which asserted theories of contract and tort liability and violations of G. L. c. 93A, §§ 2 (a) and 11. Boston University's answer contained nine counterclaims stating various theories of wrongdoing on Linkage's part and also included a claim under G. L. c. 93A. A judge in the Superior Court granted summary judgment to Boston University on some of Linkage's claims. That judge thereafter recused himself from the case at Linkage's request because, prior to his appointment to the bench, the judge had practiced law with the law firm representing Boston University. The judge next assigned to the case held pretrial conferences, after which he set aside portions of his predecessor's grant of summary judgment. A twenty-nine day jury trial ensued.[1] The jury, in response to a lengthy set of special questions, found Boston University liable for breaches of contract, defamation, wrongful interference with advantageous relations, and violations of G. L. c. 93A. The jury rejected all but one part of Boston University's counterclaims. The judge treated the jury's answers to the special questions on the G. L. c. 93A issues as advisory and subsequently made his own findings of fact and rulings of law on those issues. He also concluded that Boston University had violated G. L. c. 93A, and that Linkage had not. As provided for by G. L. c. 93A, the judge doubled portions of the damages award by the jury and awarded Linkage its attorney's fees and costs. Both before and after his decision on the G. L. c. 93A issues, the judge decided several post trial motions, eventually allowing judgment not withstanding the verdict on some of Linkage's recovery and denying Boston University a new trial on the remainder. Both parties claimed appeals, and we granted Boston University's application for direct appellate review.

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[1] Some of the claims were abandoned before trial.

We conclude that the jury's findings that the agreement had been renewed were warranted, and the judge should not have granted Boston University judgment notwithstanding the verdict on the renewal claim. Accordingly, we reinstate the jury's finding on that claim and their award of damages. We also conclude that the jury's finding on Linkage's claim for tortious interference with advantageous business relations may not stand. We uphold the jury's finding on defamation, but vacate their award of damages. We determine that Linkage can be given all the relief it is entitled to under the jury's findings that the agreement had been renewed, and the judge's G. L. c. 93A decision. As a result, we need not deal separately with Linkage's claims for promissory estoppel, breach of the covenant of good faith and fair dealing, or breach of contract (as applicable to the original agreement between the parties) or with its tort claims, except to indicate the grounds on which we set aside the jury's finding on the tortious interference claim and their award of damages on the defamation claim.

1. Background. We recount at some length the facts that could have been found by the jury. Because of the jury findings in favor of Linkage, we base our recitation on the evidence and inferences most favorable to it.

Linkage was founded in 1988 by Philip Harkins to facilitate the creation of corporate training programs for companies and universities. Harkins, who had a background in both education and computer software for business systems, thought that there was a market for intensive training programs targeted at data processing professionals and software specialists and that, in partnership with a college or university, he could develop a series of educational programs and successfully launch his business.

Boston University became aware of Harkins's plans to start Linkage and expressed an interest in working with Linkage to develop training programs. Boston University had recently

acquired the Wang Institute, a facility consisting of an 80,000 square foot building located on 200 acres in Tyngsborough, and had assumed the debt on the facility.[2] Harkins met with J. Joseph Meng, Boston University's vice-president for external programs, and discussed his ideas for training offerings with Meng. Meng was looking for a way to produce a revenue stream that would offset Boston University's considerable overhead on the new facility, and Linkage's programs presented a possible solution to this revenue problem.

Together with Dennis Hart of Boston University's office of general counsel, Harkins and Meng drafted an agreement that covered the operation of Linkage's training programs at the Wang Institute (base agreement). Under the terms of the base agreement, Linkage's performance was to be measured by revenue produced, and Linkage was to receive bonuses for achieving revenue goals. The base agreement also contained a provision restricting both Linkage and Boston University from hiring each other's employees for a period of one year following the termination of the agreement.

At the time that Linkage and Boston University undertook performance of the base agreement, Meng reported to John Silber, the president of Boston University, and to Jon Westling, executive vice-president and Silber's second in command.[3] Silber reviewed the base agreement in draft form and discussed its provisions with Meng, but Meng understood that he had actual authority to negotiate and sign the agreement with Linkage.

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[2] Boston University's acquisition of the Wang facility had been financed through a Massachusetts Health and Educational Facilities Authority (HEFA) loan, a loan with a reduced interest rate designed for tax-exempt organizations. See St. 1969, c. 454, as amended.

[3] Westling acquired the title of provost in June, 1991.

Meng and Harkins executed the base agreement on August 1, 1988. Harkins signed on behalf of Linkage, and Meng signed on behalf of Boston University. The base agreement was limited to a term of three years, ending August 1, 1991. Under the base agreement, Linkage was to manage and market educational programs and services at the Wang facility, renamed the Boston University Corporate Education Center (BUCEC). Boston University agreed to provide over-all direction and supervision of BUCEC, and Meng was given final authority and decision-making power over the development and content of all educational activities, the recruitment and appointment of instructional personnel, and promotional activities.

Under the arrangement, Linkage initiated a variety of training programs, conferences, seminars, and other offerings for the corporate market. Boston University also transferred some university courses to BUCEC, which Linkage then managed for the university. Linkage's performance under the base agreement was highly successful: Linkage exceeded its revenue targets during each of the three years of the base agreement's operation, earning bonus payments as provided in the base agreement.

Harkins reported on a monthly basis to Meng, who reviewed every activity within BUCEC and approved Linkage proposals for new programs. Although Linkage was responsible for managing BUCEC programs, both credit and noncredit, it did not have total financial responsibility over the operation. All income generated by BUCEC was paid directly to Boston University, and Meng was responsible for all financial reporting. BUCEC's financial office, headed by a Boston University employee, prepared a monthly accounting for Meng's re-

view, tracking revenues and expenses and documenting how much money was owed by each organization to the other.[4]

Another division of Boston University, the Metropolitan College (MET College),[5] ran a training program, professional development seminars (PDS), under contract with another independent training and development company similar to Linkage. When the PDS contract expired at the end of June, 1989, Linkage assumed responsibility for this program. Eventually, Linkage executed a contract with Boston University to run the PDS program (MET College contract). The compensation under the MET College contract differed from Linkage's compensation under the base agreement: under the latter, Boston University received all revenues from the programs and Linkage was paid a fee with incentive bonuses, while under the MET College contract, Linkage received all revenues, paid all expenses, and remitted a 9.15 per cent royalty to Boston University. The MET College contract also provided for six months' prior notice before either party could terminate the agreement and contained a no-hire provision similar to the one in the base agreement. The MET College contract was executed on February 6, 1990. Kenneth Condon, Boston University's assistant treasurer, signed the agreement on behalf of Boston University.[6] As with the programs in operation under

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[4] Although the base agreement did not provide which party would pay the expenses for the various programs that Linkage was to operate, Meng and Harkins orally agreed on the responsibility for these expenses after the base agreement went into effect.

[5] Boston University's Metropolitan College is an evening and weekend division of the university, offering both credit and noncredit courses and programs.

[6] When the MET College contract was signed, Silber was on leave of absence, and Westling was acting president. Westling had acted in Silber's stead when Silber had gone on sabbatical in 1987 and served as interim president again during Silber's campaign for Governor of Massachusetts in 1990.

the base agreement, Meng supervised Linkage's operation of the PDS programs.

In August, 1990, Harkins and Meng began discussing renewal of the base agreement, scheduled to terminate on August 1, 1991. Harkins wanted to begin negotiations early so that, in the event the base agreement was not renewed, Linkage would have time to replace Boston University as a client. In addition to the renewal of the base agreement, Harkins and Meng negotiated the incorporation of the MET College contract into the base agreement.[7]

In March, 1991, Meng and Harkins, under the direction of Hart, agreed to fold the MET College contract into the base agreement, with the result that Linkage would no longer directly incur the expenses for or receive the revenue from the PDS program and instead would receive a fee for management.[8] Hart, as Boston University's legal counsel, also expressed concerns that regulations governing Massachusetts Health and Educational Facilities Authority (HEFA) loans (see note 2, supra), which prohibited reduced rate loans for profit-making institutions, might be violated by the base agreement's provision that authorized bonus payments to Linkage. Harkins and Meng took these issues into consideration as they proceeded through their negotiations toward renewal of the base agreement.

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[7] When the MET College contract was originally negotiated, the parties had agreed that Linkage would use Boston University's bulk rate charitable postal permits. A subsequent investigation by the United States Postal Service had concluded that Boston University had improperly allowed Linkage to use its charitable institution bulk mail permits for the MET College program. The postal service concluded that Linkage operated in a commercial context and was therefore ineligible to use the permits. The parties needed to adjust the MET College contract to reflect the current postal service position.

[8] It was hoped that this arrangement would pacify the postal service and allow Linkage to continue to use Boston University's postal permits.

On March 5, 1991, Boston University instituted a series of changes designed to control costs (March 5 directive). Included in these changes was a requirement that any expenditure greater than $ 5,000 would require approval of the appropriate dean or vice-president of the university and the provost [*8] or senior vice-president. A copy of these new fiscal austerity measures was sent to Harkins and to all vice-presidents, including Meng.

Assuming that the base agreement would be renewed, Harkins and his management team prepared a business plan for the next three years, which was presented at the April meeting of Boston University's trustees in Scottsdale, Arizona. Boston University's chief financial officers attended Harkins's presentation to the trustees. Silber and Westling did not. The Linkage business plan was well received by the assembled senior Boston University officials.[9]

On April 28, 1991, following the presentation of Linkage's business plan at the trustees' meeting, Hart, Meng, and Harkins met, together with Linkage's chief financial officer and the person in charge of financial operations on the Boston University campus. At that meeting, it was agreed that the MET College contract would be folded into the renewal of the base agreement, and new compensation arrangements were reviewed. On May 21, 1991, Meng and Harkins executed an agreement, which had already gone through several revisions to address concerns expressed by Hart, terminating the MET College contract and making it part of the base agreement

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[9] At their meeting in Scottsdale, the trustees also considered a proposal for the Tyngsborough facility that involved the creation of a conference center there including a golf course. Harkins and Meng were present during a discussion of this proposed new use of BUCEC. Meng subsequently expressed to Silber his concerns that there was no real market for the golf course concept, and that its creation would be inconsistent with academic programs at BUCEC, perhaps jeopardizing HEFA financing.

(May 21 agreement).[10] The language of the May 21 agreement provided that the base agreement "is being revised and renewed effective July 1, 1991."[11]

Meng promptly sent a confirmatory copy of the May 21 agreement to Westling and Condon. On May 21, 1991, Westling had a copy of the May 21 agreement, together with a copy of the renewal agreement, the terms of which, according to Meng, had been completely finalized. Westling also had a memorandum from Meng directly asking whether anything further was required to secure Boston University's approval. On May 22, Westling met with Harkins and Meng. At that meeting, Harkins reviewed the business plan and told Westling about steps Linkage had taken to expand operations. Westling questioned Harkins regarding conferences and Linkage employees, including program and instructor evaluations. Westling did not raise any concerns about the May 21 agreement or the renewal agreement at this meeting, nor did he object to the fact that Meng had executed the May 21 agreement

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[10] The relevant provisions of the May 21 agreement read as follows:

> "[Boston] University and Linkage have agreed to terminate the MET College contract and to incorporate the Professional Development Seminars into the base agreement through which Linkage provides services to Boston University's Corporate Education Center. That base agreement is being revised and renewed effective July 1, 1991. . . ."
>
> "The parties hereby further agree that the MET College contract is terminated effective July 1, 1991. The parties' relationship with respect to the Professional Development Seminars will thereafter be governed by and provided for in the base contract between the parties which otherwise governs activities at the Boston University Corporate Education Center."

[11] Although the base agreement was not scheduled to terminate until August 1, 1991, the renewal agreement was dated July 1, to correspond with the first day of Boston University's fiscal year and because the HEFA bonds had to be refinanced by June 30, 1991.

on behalf of Boston University in apparent contravention of the March 5 directive.

On May 29, 1991, Silber's chief of staff sent a memorandum on behalf of Silber to Westling, Hart, and Condon, asking about the status of the renewal agreement.[12] Westling and Meng subsequently joined Silber in Germany. In his discussions with Meng in Europe, Silber raised no concerns about Linkage, the renewal agreement, or BUCEC.[13] Silber told Meng that he wanted additional information on Linkage. He and Meng agreed that Harkins would repeat the presentation made by Harkins to the trustees for Silber's benefit after he returned from Europe.

On June 24, 1991, Harkins met with Silber, Westling, and Meng. Silber was rude and confrontational during this meeting, and his actions made it impossible for Harkins to present his business plan. Silber abruptly and angrily left the meeting after only twenty-five minutes.[14] Westling reassured Harkins, who was concerned by what appeared to be Silber's open hostility toward him, and told him, "Things will be all right."

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[12] Silber was on university business in Germany. The memorandum stated:

> "Dr. Silber sent a message this morning from Europe that the Linkage contract should not be signed prior to his return on the 17th of June, if it has not already been signed. If it has been signed, Dr. Silber would like Jon Westling to bring it with him to Europe so that he and Dr. Silber may discuss it."

[13] Silber testified that he told Meng in Heidelberg that the renewal agreement was not to be signed until he was satisfied with Linkage's financial performance. Meng disputed Silber's recollection.

[14] Silber testified that his concern was his inability to assess the value added by the contractual relationship between Boston University and Linkage. According to Silber, this information was not readily apparent from the business plan.

After leaving the meeting, Silber ordered an unannounced internal audit of Linkage.[15] Harkins, notified of the audit by his staff on his arrival at a BUCEC conference in New Jersey, immediately returned to Massachusetts and assisted the auditors in gathering information for the audit.

Unbeknownst to Harkins or Meng, Silber had been in direct contact with various individuals associated with Linkage's operations at BUCEC. Since his return from Germany, Silber had been in contact with James Devlin, his son-in-law and a part-time instructor in some of the BUCEC programs, and Robert Daniels, a Boston University employee who had originally been hired to work on BUCEC projects by Linkage. In the period of time before and after the June 24 meeting, Daniels had extended telephone conversations with both Silber and Devlin,[16] and met personally with Silber.[17]

On July 1, Silber again met with Harkins, Meng, and Westling. During the course of that meeting, Silber contended that he was free to hire Linkage's employees despite the express no-hire provision in the base agreement and asked which employees were the most valuable. Harkins declined to give him

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[15] No audit of Linkage's operations had ever been done during the three years of the base agreement.

[16] These telephone conversations, some of which were over three hours long and placed in the middle of the night, took place on June 23 and 24 and were placed by Daniels from his hotel room in New Jersey where he was working on the BUCEC conference. Between June 22 and 28, Daniels spent over fifteen and one-half hours on the telephone, predominantly with Devlin.

[17] Both Devlin and Daniels had reason to encourage Silber's negative attitude towards Linkage. Devlin had been reprimanded by Harkins in 1988 and 1989 for making derogatory and racially biased statements while teaching at BUCEC. Daniels had had a series of disputes with Harkins over the manner in which his commissions were calculated. Silber also met secretly with Roy Einreinhofer, a Linkage employee, on June 30, 1991, for the purposes of obtaining information about Linkage's programs, operations, and employees.

this information and insisted that Silber had no right to hire Linkage's employees under the base agreement. Harkins advised Silber that Linkage had turned down opportunities to work with other universities. Silber revealed that he was aware of certain complaints about Linkage. At the close of the meeting, in response to a question by Harkins, Silber told him that the May 21 agreement that Harkins had signed with Meng was ineffective.

Meng, Silber, and Harkins met for the final time on July 3, 1991.[18] At this meeting, Silber produced a preliminary audit report, which, he asserted, gave cause to terminate any agreements between the parties. Silber then demanded that Harkins sign a letter, which, in addition to other provisions, waived the no-hire provisions of the base agreement. When Harkins declined, citing his desire to consult with an attorney, Silber withdrew the first letter and handed Harkins a second letter terminating the base agreement between the parties for cause, effective immediately, based on an unfavorable audit and Linkage's failure to cooperate with the auditors. The letter also terminated the MET College contract between the parties.

Prior to the July 3 meeting, Silber had ordered Boston University security personnel and vice-presidents, including Westling, to stand by, ready for immediate action at BUCEC. After the meeting with Meng and Harkins, Silber directed this team to "secure [Boston University's] interests" and authorized them to offer increased salaries, if necessary, to Linkage employees to ensure that BUCEC operations would not be interrupted by the termination of the Linkage contract. By the time Harkins returned to Tyngsborough, Boston University security

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[18] Meng notified Silber of his intent to resign from Boston University on July 1, 1991, and submitted his written resignation to Silber on July 3 before the meeting. Meng was upset about Silber's approach to Linkage and Harkins and considered Silber's conduct unreasonable and unethical. Meng's resignation resulted in severe economic ramifications for him and his family.

personnel and officials had occupied BUCEC. Some of the security personnel were armed.

Boston University officials gathered Linkage employees into a room. Westling told the assembled employees that Boston University's contract with Linkage had been terminated "for cause." In response to a question by a Linkage employee, who detected an intimation of wrongdoing in the statement "for cause" and sought clarification, Westling simply repeated that the contract had been terminated "for cause."[19] Harkins then met with his employees. Harkins told his employees that he would not seek legal recourse from individual employees if they were offered and accepted employment from Boston University. Harkins indicated that he would seek such recourse from Boston University for violating the no-hire provision of the base agreement.

Boston University officials came to BUCEC with prepared letters offering employment to selected Linkage employees. While Harkins was gathering his belongings, Boston University conducted interviews with Linkage employees and hired twenty-eight of Linkage's thirty-two employees on the spot. Boston University insisted on review of all documents that Harkins was removing from the facility, refused to allow Harkins to take some of his personal papers, and made copies of everything that Harkins removed from his office.

At 11 P.M., in response to a threat by a Boston University official, Harkins called Tyngsborough police, who sent an officer to stand watch in Harkins's office. At 4:30 A.M., Harkins and his senior management left Linkage. As they left the facility, Westling swore at them and told them never to set foot on Boston University property again.

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[19] The judge found in his G. L. c. 93A decision that Westling knew when he made this statement that there was no cause for termination.

After Boston University took over operations at BUCEC, Daniels was hired to head the conference programs at BUCEC, reporting directly to the executive director, and received a raise in pay. In conversations with a Linkage employee who had been hired by Boston University; Daniels made disparaging comments about Linkage and its senior management, implying illegal activity had been the reason for the abrupt termination of the contract. Silber also made unfavorable comments about Linkage to a newspaper reporter.

The internal audit of Linkage operations continued after the takeover. Investigations by the Boston University internal audit department and outside auditors employed by Boston University produced evidence of minor errors in Linkage's reporting of financial matters. Boston University alleged after the termination of the base agreement that a Linkage employee had made backup copies of some Linkage files and that these backup copies were missing.

After the takeover, Linkage was unable to replace Boston University as a client, due in part to its reduced staff and to the conditions surrounding the termination of its contractual relationship with Boston University. Although it has rebuilt to some extent in the time since the termination of its contract with Boston University, the company has not been able to regrow its business to the point where it was in July, 1991.

2. Preliminary issues. We first take up three issues raised by Boston University that, it argues, require a new trial.

(a) Boston University contends that the judge should have granted its several motions that he recuse himself. The motions stemmed from what Boston University perceived as negative comments about Silber made by the judge during settlement conferences and jury selection. The comments occurred in the give-and-take of those proceedings and generally

concerned reasons why the judge did not vote for Silber in the 1990 gubernatorial campaign. In considering recusal, the judge conceded that he had been "candid" with counsel when discussing Silber's candidacy for governor, but expressed his opinion that counsel for Boston University had taken his comments out of context and had distorted them. The judge also pointed out that he had expressed admiration for Silber's considerable accomplishments at Boston University.

The judge consulted his own emotions and conscience to determine whether he lacked the capacity to act fairly and impartially, and he concluded that no disabling bias existed. See *Haddad v. Gonzalez, 410 Mass. 855, 862-864, 576 N.E.2d 658 (1991),* and cases cited. The judge also concluded that the case was not one in which his impartiality might reasonably be questioned. See *id. at 862,* quoting S.J.C. Rule 3:09, Canon 3 (C) (1), as appearing in *382 Mass. 811 (1981).* We are satisfied that the judge did not harbor any personal bias against either Silber or Boston University, and that no other impediment existed that might require the judge to step aside.

(b) Boston University contends that the judge lacked authority to set aside the grant of partial summary judgment ordered by the first judge because the judge should have recused himself. As indicated, the judge's choice to continue with the case in the face of multiple recusal motions was proper. The judge's decision to vacate the summary judgment order was also proper. A judge who is assigned a case for trial has "authority to reconsider [a] motion for summary judgment sua sponte," *Riley v. Presnell, 409 Mass. 239, 242, 565 N.E.2d 780 (1991),* and "an order for partial summary judgment is . . . subject to revision at any time by the trial court prior to the entry of a judgment disposing of all claims against all parties to the action." *Acme Eng'g & Mfg. Corp. v. Airadyne Co., 9 Mass. App. Ct. 762, 764, 404 N.E.2d 693 (1980). See Peterson*

v. Hopson, 306 Mass. 597, 601-603, 29 N.E.2d 140 (1940). Our review of the record also indicates that partial summary judgment was not properly granted in the first place because triable issues of material fact existed on the issues eventually sent to the jury for decision.

(c) After the judge set aside the grant of partial summary judgment discussed above, Linkage and Boston University, at the judge's request, prepared a statement of facts, that, at the time, were perceived as uncontroverted. This statement was introduced in evidence at the trial as exhibit 1. Near the end of the trial, the judge allowed a motion by Linkage to strike exhibit 1 and to set aside the balance of the previous judge's order granting summary judgment.[20] The judge's action in striking the exhibit was within his discretion. In the course of a lengthy trial, the exhibit was rarely referred to by counsel for Boston University, and[21] when counsel did refer to it, the information in the exhibit was substantially duplicated by other evidence presented to the jury. Facts in the exhibit were contradicted by Linkage's evidence at trial and, because the exhibit was based on an erroneous grant of partial summary judgment, many statements in the exhibit were misleading. In our view, neither Boston University's reliance on exhibit 1, nor the timing of the plaintiff's motion to strike, substantially

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[20] At the same time, the judge, sua sponte, vacated the grant of summary judgment to Boston University on Linkage's claims for breach of the renewal agreement and breach of the implied covenant of good faith and fair dealing.

[21] We find only eight occasions during the course of the trial where the defendant's counsel made reference to exhibit 1 while questioning witnesses. Except for a brief last reference on day nineteen of the trial, defense references to exhibit 1 occurred on or before day nine of a twenty-six day trial. The exhibit was never actually given to the jury, and the portions of it that were read into the record by defense counsel comprised a minuscule part of a 5,000 page transcript.

altered the defense of the case. Boston University's case was not prejudiced as a result of the decision to strike exhibit 1.

3. Contract claims. We next examine the jury's responses to a series of special questions concerning Linkage's claims for violations of pertinent agreements.[22] Our inquiry is conducted under the well-established standard that a jury verdict for a plaintiff is sound if any reasonable view of the evidence discloses any combination of circumstances from which a rational inference may be drawn in the plaintiff's favor, even if different circumstances shown by the evidence would sustain a defense verdict. See *Ferragamo v. Massachusetts Bay Transp. Auth., 395 Mass. 581, 591, 481 N.E.2d 477 (1985); H.P. Hood & Sons v. Ford Motor Co., 370 Mass. 69, 71-72, 345 N.E.2d 683 (1976).*

(a) Renewal agreement. The jury found that Boston University had entered into the renewal agreement with Linkage and had committed a material breach of that agreement. The jury awarded damages to Linkage, in the amount of $ 2,148,000 for lost profits and $ 330,358 for out-of-pocket damages. The judge entered judgment notwithstanding the verdict on these findings, but later partially vacated this order and reinstated the jury's award for out-of-pocket damages. We conclude that the jury's findings on this claim should be upheld in their entirety.[23]

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[22] The jury also made findings on several counterclaims brought by Boston University against Linkage. The jury found for Boston University only on its claim for out-of-pocket damages and awarded $ 74,246 to Boston University. This award is uncontested on appeal.

[23] The jury also found that Boston University had not violated the base agreement or the MET College contract. In response to a question submitted by the jury during their deliberations, the judge had instructed the jury that, if they found the renewal agreement had gone into effect before the end of an earlier contract, the latter would be superseded and should be disregarded. We need not consider

Linkage contended that Boston University became bound to the renewal agreement on May 21, 1991, when Meng and Harkins signed an agreement that (1) terminated the MET College contract effective July 1, 1991, (2) provided that the activities covered by that contract would thereafter be governed by the base agreement, and (3) stated that the "base agreement is being revised and renewed effective July 1, 1991." For Boston University to be bound by Meng's action, the jury had to find, as a fact, that Meng had either actual or apparent authority to enter into the renewal agreement, or that Boston University had acquiesced in, or failed lawfully to disavow, any unauthorized conduct by Meng, and consequently had become bound by that conduct through ratification. The judge carefully instructed the jury on the requirements for establishing a binding agreement under these theories, but the special verdict form submitted to the jury did not include an express question relating to the existence of actual authority. It is not of consequence whether the evidence would have supported a finding of actual authority because the jury found that Boston University was bound by the renewal agreement on the basis of both apparent authority and ratification. There was sufficient evidence to support both of these findings.

(i) Apparent authority. "Apparent or ostensible authority 'results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to enter into negotiations or to make representations as his agent.' . . . If a third person goes on to change his position in reliance on this reasonable belief, the principal is es-

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whether this instruction was correct and whether Linkage is entitled to a new trial on its claims for breach of the prior contracts, because any award for breach of the prior contracts would duplicate the award for breach of the renewal agreement.

topped from denying that the agency is authorized." (Citations omitted.) *Hudson v. Massachusetts Prop. Ins. Underwriting Ass'n, 386 Mass. 450, 457, 436 N.E.2d 155 (1982).* We inquire whether conduct of Boston University's executives warranted a finding that Harkins reasonably believed Meng had authority to enter the renewal agreement.

The jury reasonably could have made the following findings. As Boston University's vice-president for external programs, Meng had virtual autonomy in supervising Linkage's programs at BUCEC. He negotiated and signed the base agreement on behalf of Boston University. Meng was responsible for ensuring Linkage's performance under the base agreement and the MET College contract. When Meng discussed with Silber the renewal of the base agreement in late 1990, Silber gave Meng a green light to proceed, indicating that the arrangement with Linkage had been advantageous to Boston University. Throughout negotiations with Linkage for renewal of the base agreement and the incorporation of the MET College contract therein, Meng was Boston University's primary representative.[24] In both the base agreement and in the MET College contract, Meng was named the official representative of Boston University for all legal notice. It was therefore reasonable for Harkins to believe that Meng had the authority to sign the May 21 agreement, thereby binding Boston University to the termination of the MET College contract, the "fold-in" of that contract to the base agreement, and the renewal agreement.

The strongest evidence against the existence of Meng's apparent authority is the March 5 directive requiring approval by Boston University's provost or a senior vice-president for expenditures over $ 5,000. Harkins had received this directive.

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[24] As legal counsel for Boston University, Hart assisted in the drafting of the renewal agreement to ensure that the terms agreed on by Harkins and Meng were put into proper legal form.

Nonetheless, the jury could have found that Boston University's conduct led Harkins to believe that the directive would not apply to the May 21 agreement or to its renewal of the base agreement. Linkage presented evidence that after the issuance of the March 5 directive, payments were authorized involving BUCEC operations without any approval as required by the directive. From his knowledge of the operations of BUCEC, and his observations of the manner in which decisions concerning Linkage's arrangements with Boston University had been reached in the past, Harkins could have reasonably concluded that the March 5 directive expressed a policy that was not always enforced, especially to programs like BUCEC that were headed by someone with direct contact to Silber. After all, it is not uncommon for an employer to issue a mandate concerning financial expenditures, and then to ignore or overlook the mandate in circumstances that suggest benign oversight because the employer's advantages are being advanced.

Based on the evidence, and their assessment of the credibility of the witnesses, the jury properly could have found that Meng had apparent authority to sign the May 21 agreement, and that the execution of that agreement bound Boston University to the renewal of the base agreement on terms that had been agreed to by Meng and Harkins.

(ii) Ratification. Where an agent lacks actual authority to agree on behalf of his principal, the principal may still be bound if the principal acquiesces in the agent's action, or fails promptly to disavow the unauthorized conduct after disclosure of material facts. "It is the instant duty of a principal, upon ascertaining the facts, at once to disaffirm an act done in his name by an agent in execution of a power conferred but in a mode not sanctioned by the terms of the agency or in excess or misuse of the authority given." *Boice-Perrine Co. v. Kelley,*

243 Mass. 327, 330-331, 137 N.E. 731 (1923). See *Irving Tanning Co. v. Shir, 295 Mass. 380, 384, 3 N.E.2d 841 (1936)* (ratification of agent's unauthorized acts inferred where, after knowledge, principal made no effort to repudiate them). Ratification relates back, and has the same effect, as a prior grant of authority by the principal to the agent. See *Canton v. Bruno, 361 Mass. 598, 607 n.8, 282 N.E.2d 87 (1972); White v. Apsley Rubber Co., 194 Mass. 97, 100, 80 N.E. 500 (1907).*

The jury could have found that any deficiency in Meng's authority to execute the May 21 agreement was obviated by subsequent conduct of Boston University officials, especially Westling in his capacity as provost and executive vice-president, whose approval was ostensibly required by the March 5 directive. Meng sent copies of the May 21 agreement to Condon and Westling immediately on its execution. The draft of the renewal agreement was attached to the May 21 agreement, as was a memorandum from Meng explaining the renewal agreement and explicitly asking whether any further review was needed to secure approval. Harkins and Meng met with Westling on May 22 so that Harkins could present his business plan. Westling did not raise any objections to the renewal agreement, nor did he indicate that the agreement required further approval from him or others before it could take effect. Condon never responded to Meng's query as to whether any further action would be needed. Silber also failed to repudiate Meng's action on behalf of the university. When he met with Meng in Europe in late May, Silber told Meng only that he wanted to "get up to speed" on the Linkage operation, and Silber expressed no objection to the agreement or that Meng had been unauthorized to enter into it without any further approval. Thus, neither Silber nor Westling raised any question about the validity of the renewal agreement until the meeting on July 1, when Silber finally told Harkins and Meng

that, in Silber's opinion, Boston University was not bound by the renewal agreement.

Based on this sequence of events, the jury reasonably could have found that ratification of Meng's execution of the May 21 agreement by Boston University followed from the informed acquiescence of Westling, Silber, and other Boston University officials, and from their failure promptly to disavow Meng's conduct after learning material facts.

There is an additional factor supporting the jury's decision: Boston University clearly benefited from the provisions in the May 21 agreement that folded the MET College contract into the base agreement. "It is settled that one cannot accept the benefits of a transaction purporting to be done in his behalf and afterwards repudiate it." *Shoolman v. Wales Mfg. Co., 331 Mass. 211, 216, 118 N.E.2d 71 (1954)*, quoting *Calkins v. Wire Hardware Co., 267 Mass. 52, 68, 165 N.E. 889 (1929)*. By incorporating the MET College contract into the base agreement, Boston University eliminated the six-month notice for termination in the MET College contract, and the agreement helped to resolve existing problems with the use of the nonprofit postage permit and potential problems with the HEFA financing incurred in connection with the university's acquisition of the BUCEC site. The jury reasonably could have found Harkins credible when he testified that Linkage agreed to terminate the separate MET College contract only as part of a larger arrangement by which the base agreement was to be renewed.[25] After the May 21 agreement was executed, the "fold-in" provisions were implemented and the terms of the base agreement were followed for both programs. Boston

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[25] If it had not been terminated by the May 21 agreement, the MET College contract would not have expired until June, 1993. The jury could have inferred that it would have been illogical for Harkins to have executed the May 21 agreement except in connection with a renewal of the base agreement and that Boston University clearly benefited from the "fold-in" provision.

University's acceptance of the benefits of the May 21 agreement thus finished a separate, and important, indication of its acquiescence to, and ratification of, the renewal agreement. See *Kidder v. Greenman, 283 Mass. 601, 616, 187 N.E. 42 (1933); Maloon v. Barrett, 192 Mass. 552, 555, 78 N.E. 560 (1906).*

(b) "Promissory estoppel."[26] The jury also found that Linkage had reasonably relied to its detriment on Boston University's promise to enter into the renewal agreement and awarded lost profits in the amount of $ 787,239 and out-of-pocket damages of $ 7,740 to Linkage. The judge entered judgment notwithstanding the verdict on this claim, but later vacated this order and reinstated the jury's findings. Because we conclude that an award for lost profits on this claim would duplicate the award for the breach of the renewal agreement, as the two claims involve alternative legal theories of recovery,[27] we need not address the merits of Linkage's promissory estoppel claim. We shall, however, let the jury's small award of $ 7,740 for out-of-pocket damages on this claim stand. It is obvious that this award covers expenses incurred by Linkage in start-up costs for a planned Chicago office and does not duplicate any other out-of-pocket expenses awarded to Linkage.

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[26] This claim was argued by the parties and presented to the jury as a claim for "promissory estoppel," even though "we do not use the expression 'promissory estoppel,' since it tends to confusion rather than clarity." *Loranger Constr. Corp. v. E.F. Hauserman Co., 376 Mass. 757, 761, 384 N.E.2d 176 (1978).*

[27] The judge had so informed the jury, and had instructed them to enter the same amount for this "promissory estoppel" claim as for the renewal agreement claim. The jury, however, awarded a lesser amount for the former than for the latter. Linkage argues that the award may have represented "the value of Linkage's goodwill," but we can discern no basis for a conclusion by the jury that would support such an award.

Despite the jury's placement of the sum on the verdict form, Linkage is entitled to these damages.

(c) Breach of the covenant of good faith and fair dealing.

The jury also found that Boston University had committed a breach of the covenant of good faith and fair dealing owed to Linkage and awarded $ 250,000 in damages. The judge entered judgment notwithstanding the verdict on this claim. The jury's finding that the covenant had been violated is supported by the evidence, but the damages awarded are duplicative of the damages for breach of the renewal agreement and cannot be recovered.

4. Tort claims. The jury returned findings that Boston University had tortiously interfered with Linkage's advantageous business relations and had defamed Linkage.

(a) Tortious interference. The jury's finding on this claim stemmed from the evidence that Boston University had hired twenty-eight of Linkage's employees. The jury awarded damages of $ 280,000. There is no question that the evidence warranted a finding that Boston University had violated the no-hire provisions of the agreements and thus would be liable for breach of contract. The jury, however, did not consider this theory, but rather dealt only with the tort claim. We have grave doubts that, if considered on the merits, the jury's tortious interference finding could stand. We need not, however, deal with the claim under either a tort or contract theory because Linkage provided no evidence of damages. The jury were instructed that the "measure of damages . . . for the loss of [Linkage's] employees caused by the alleged wrongful actions of [Boston University] is the cost of training replacements for those employees." This instruction was correct. See *Augat,*

Inc. v. Aegis Inc., 417 Mass. 484, 485, 631 N.E.2d 995 (1994). Linkage introduced evidence that its employees were valuable assets and that it could not operate without them, but it introduced no competent evidence as to the cost of hiring and training replacement employees. The jury's award of $ 280,000 in damages is speculative and must be set aside.[28]

(b) Defamation. The jury found that Boston University officers and employees had defamed Linkage and its principals and awarded damages of $ 1,060,641.01. We conclude that, while there was sufficient evidence to support a finding of defamation, the award was clearly excessive and probably punitive.[29] We set aside the entire award. The evidence that supported the jury's finding of defamation likewise supported the judge's conclusion that defamation constituted an unfair and deceptive practice in violation of G. L. c. 93A.[30] However, any award for defamation must be based on damages suffered by Linkage because of the defamatory remarks. The remarks

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[28] The damages are also not supportable on any theory that Linkage may have lost profits during the period required to replace the employees because Linkage is receiving its lost profits for the three years of the renewal agreement.

[29] The judge instructed the jury on the legal requirements for finding defamation, but he failed to give any instructions on how damages should be calculated.

[30] The jury would have been warranted in finding that statements made by Daniels to a Linkage employee were defamatory because the statements accused Harkins and his brother of criminal conduct. The statements were made in a private conversation and would not support any measurable damages. Also, the jury would have been warranted in finding that Westling's statements to Linkage employees on the day of the termination, that the termination was "for cause," were defamatory when considered in the context of the hostile and forcible takeover of Linkage's offices, because the statements conveyed a message to those employees that Linkage had been involved in serious wrongdoing. The jury would not have been warranted in finding that statements made by Silber to the Boston Globe were defamatory.

were, as the judge observed, made to Linkage employees in an effort to "sow[ ] the seeds of discord" and undermine their loyalty to Linkage. We think the only injury sustained by Linkage that could properly be attributed to the defamation is the cost of replacing the employees whose decision to leave Linkage's employ might have been influenced by the remarks. As has been discussed, there is no evidence of such damages. Linkage has otherwise been made whole for its lost profits, and there is no other basis to sustain an award of defamation damages, much less an award of the magnitude returned by the jury.

5. General Laws c. 93A. The judge entered his own decision on the G. L. c. 93A claims, treating the jury's findings as advisory.[31] The judge ruled correctly on two threshold questions governing the applicability of the statute: the arrangements between Linkage and Boston University did not involve an intra-enterprise dispute, and Boston University was engaged in trade or commerce in its arrangement with Linkage. We also agree that Boston University's conduct violated G. L. c. 93A. Our conclusions concerning the jury's findings, however, have disturbed the bases on which the judge founded his calculation of damages under G. L. c. 93A,[32] that a new judgment has to be entered on damages.

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[31] Boston University argues that the judge erred in electing to treat the jury's G. L. c. 93A decision as advisory. The judge initially stated that "the jury [will] decide the [c.] 93A claim[s]," but chose after trial to issue his own findings in order to avoid a retrial if one of his key jury instructions was found to be erroneous. The judge's decision to treat the jury verdict as advisory was within his prerogative. See *International Totalizing Sys., Inc. v. PepsiCo, Inc., 29 Mass. App. Ct. 424, 435-436, 560 N.E.2d 749 (1990); Acushnet Fed. Credit Union v. Roderick, 26 Mass. App. Ct. 604, 606, 530 N.E.2d 1243 (1988).*

[32] As damages under G. L. c. 93A, the judge doubled the jury's award of damages in favor of Linkage on its claims for promissory estoppel, tortious interfer-

(a) Applicability of G. L. c. 93A. The applicability of G. L. c. 93A, §§ 2 (a) and 11, to interaction between two parties requires a dual inquiry: first, the court assesses whether the interaction is "commercial" in nature, and second, it evaluates whether the parties were both engaged in "trade or commerce," and therefore acting in a "business context." "[Chapter 93A, § 11] requires that there be a commercial transaction between a person engaged in trade or commerce [and] another person engaged in trade or commerce. Once it has been established that a commercial transaction exists, then [the court] addresses whether the individuals were acting in a 'business context' and applies the test discussed in *Begelfer v. Najarian, 381 Mass. 177, 190-191, 409 N.E.2d 167 (1980).*" *Szalla v. Locke, 421 Mass. 448, 451-452, 657 N.E.2d 1267 (1995).*

(i) Commercial transaction. There is ample support in the record for the judge's conclusion that the interaction between Boston University and Linkage was not intra-enterprise but instead was a "commercial transaction" for the purposes of G. L. c. 93A. See *Szalla v. Locke, supra.*[33] The arrangement between Linkage and Boston University was an arm's-length

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ence, and defamation, and also allowed out-of-pocket damages on its claim for breach of the renewal agreement.

[33] General Laws c. 93A is not available to parties in a strictly private transaction, where the undertaking is not "in the ordinary course of a trade or business." *Lantner v. Carson, 374 Mass. 606, 608, 373 N.E.2d 973 (1978).* We have limited the reach of G. L. c. 93A, § 11, to exclude intra-enterprise disputes because they are more similar to purely private disputes and are not "commercial transaction[s] . . . in the sense required by c. 93A." *Szalla v. Locke, 421 Mass. 448, 452, 657 N.E.2d 1267 (1995). See Manning v. Zuckerman, 388 Mass. 8, 14, 444 N.E.2d 1262 (1983).* Included in this "intra-enterprise" classification are disputes stemming from an employment relationship, disputes between individual members of a partnership arising from partnership business, and transactions and disputes between parties to a joint venture and between fellow shareholders. *Szalla, supra at 451,* and cases cited.

transaction between two corporations under which Linkage provided services to Boston University and received compensation. Both the base and renewal agreements state that Linkage is "an independent contractor . . . not an agent or employee of the University," indicating that, from the very beginning of their relationship, the parties did not intend to be treated as partners or participants in a joint venture. We conclude that the relationship between the parties was of a commercial nature for the purposes of G. L. c. 93A.

(ii) Trade or commerce. Boston University was engaged in "trade or commerce" in its operation of BUCEC. An entity's "status as a 'charitable' corporation is not, in and of itself, dispositive of the issue whether c. 93A applies."[34] *Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc., 398 Mass. 480, 492-493,498 N.E.2d 1044 (1986).* General Laws c. 93A, § 11, applies to any "person who engages in the conduct of any trade or commerce," as defined in G. L. c. 93A, § 1 (b) (emphasis added). This section provides that "trade" and "commerce" include "the sale, rent, lease or distribution of any services and any property" (emphasis

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[34] Nonprofit corporations have sued and been sued under G. L. c. 93A, see, e.g., *Massachusetts Farm Bur. Fed'n, Inc. v. Blue Cross of Mass., Inc., 403 Mass. 722, 532 N.E.2d 660 (1989); Charles River Mtge. Co. v. Baptist Home of Mass., Inc., 36 Mass. App. Ct. 277, 630 N.E.2d 304 (1994),* and have been held liable under the statute, see *Miller v. Risk Mgt. Found. of the Harvard Med. Insts., Inc., 36 Mass. App. Ct. 411, 632 N. E. 2d 841 (1994).* We have, however, occasionally declined to apply G. L. c. 93A to situations in which a nonprofit organization has not sought to profit from its transaction with the plaintiff. See *All Seasons Servs., Inc. v. Commissioner of Health & Hosps. of Boston, 416 Mass. 269, 271, 620 N.E.2d 778 (1993)* (statute not applicable where hospital did not seek to profit from contract with food service company and providing food services was incidental to hospital's primary activity); *Hubert v. Melrose-Wakefield Hosp. Ass'n., 40 Mass. App. Ct. 172, 661 N.E.2d 1347 (1996)* (hospital not subject to G. L. c. 93A because it was not acting in business context to generate profit through its efforts to relocate building in order to expand onto building's prior location).

added). Under the broad sweep of this language, each case requires examination of its own circumstances to determine whether it arose in a "business context." *Planned Parenthood Fed'n, supra at 493,* citing *Begelfer, supra at 190.* Application of the Begelfer "business context" test requires "assessing the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties . . . . Other relevant factors are whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons . . . and whether the participant played an active part in the transaction." *Begelfer, supra at 191.*

We agree with the judge that, in the particular circumstances of this case, Boston University was engaged in "trade or commerce." Boston University's management of BUCEC, and its contractual relationship with Linkage, do not share the characteristics of activities engaged in by other private nonprofit entities that have been determined not to have been engaged in "trade or commerce" under G. L. c. 93A. See *Poznik v. Massachusetts Medical Profession Ins. Ass'n, 417 Mass. 48, 52-53, 628 N.E.2d 1* (1994) (defendant was "'statutorily mandated nonprofit' association" whose transactions were "motivated by legislative mandate, not business or personal reasons" and therefore not engaged in trade or commerce); *Barrett v. Massachusetts Insurers Insolvency Fund, 412 Mass. 774, 776, 777, 592 N.E.2d 1317 (1992) (same); Planned Parenthood Fed'n, supra at 493-494* (where employees and incorporators of charitable entity were advocates for pro-life position and entity did not charge for its services, trademark infringement claim was beyond scope of c. 93A). In its management of BUCEC, Boston University did not operate under any legislative constraints, and corporations, participants, and others were charged fees for the services offered by Linkage and BUCEC.

The university was also actively involved in all aspects of the arrangement. The original understanding between the parties contemplated a continuing relationship between Linkage and Boston University of up to six years' duration. The relationship did not involve anything that could be said to be purely incidental to the university's educational mission, as might be a contract for services or equipment. Compare *All Seasons Servs., Inc. v. Commissioner of Health & Hosps. of Boston, 416 Mass. 269, 271, 620 N.E.2d 778 (1993)* (hospital did not act in business context where it did not seek to profit from transaction with food service vending company, and entering a contract for food services was incidental to hospital's primary function of providing medical services).

Further, G. L. c. 93A was designed "to encourage more equitable behavior in the marketplace . . . [and impose] liability on persons seeking to profit from unfair practices." *Poznik, supra at 53, citing Manning v. Zuckerman, 388 Mass. 8, 12, 444 N.E.2d 1262 (1983).* Although by definition, a qualified nonprofit corporation does not earn a "profit" from its activities, such a corporation need not be profit-making in order to profit from an activity.[35] While Boston University's status required that it remain a nonprofit corporation, it nonetheless was motivated by a strong desire to benefit as much as possible from its arrangement with Linkage, as a means of dealing with the debt service and costs of the Wang facility. As the judge observed: "Boston University entered and maintained its contractual relationship with Linkage . . . to engage in trade and commerce by having [Boston University] expand its reach . . . to the corporate market [which] provided a . . . lucrative earnings potential . . . ." Linkage's ability to "add value" to the enterprise was clearly a determining factor in Silber's decision

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[35] Our use of the term "profit" here is meant colloquially, in the sense of revenues that exceed expenses.

to terminate the base agreement and repudiate the renewal agreement. As a result of eliminating the middleman, Boston University expected to increase its revenues from the programs that Linkage had developed. By creating a pretext to justify terminating the base agreement, denying the existence of the renewal agreement, and then hiring Linkage's employees in contravention of a contractual prohibition, Silber and Boston University were seeking to "profit from unfair practices." *Poznik, supra at 53.* See *Planned Parenthood Fed'n, supra at 499* (Abrams, J., concurring in part and dissenting in part) (defendant charitable corporation operated in a "business context" where it engaged in competitive marketplace "activities . . . designed to damage or destroy its competitor").[36]

In reaching this conclusion, we emphasize the fact-specific nature of the inquiry. In most circumstances, a charitable in-

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[36] The judge's conclusion that Boston University was involved in trade or commerce was based in part on his impression that the programs and offerings taught at BUCEC were "noneducational" because they were vocational in nature and taught to nontraditional students. This impression is incorrect. We have given broad meaning to the term "education" in order to implement legislative goals and to allow education reasonable freedom to develop, and we have held that vocational and technical teaching and courses constitute education. See, e.g., *Assessors of Boston v. Garland Sch. of Home Making, 296 Mass. 378, 386, 6 N.E.2d 374 (1937)* (instruction in homemaking skills is educational); *Mount Hermon Boys' Sch. v. Gill, 145 Mass. 139, 146, 149, 13 N.E. 354 (1887)* (for purposes of statute exempting educational property from taxation, education includes teaching practical skills). As Justice Knowlton phrased the concept of education, "according to one of Webster's definitions," in the Mount Hermon decision, "to educate . . . is 'to prepare and fit for any calling or business, or for activity and usefulness in life.'" *Id. at 146.* Some of the programs offered at BUCEC through Linkage were comparable to academic courses taught in the engineering, computer science, and business administration curricula at Boston University's main campus and were clearly educational. Even though many of the courses were vocational or technical in nature and were taught at a satellite facility, they were also educational in nature. The judge's erroneous impression on this point, however, does not disturb our conclusion that the interaction between the parties occurred in a business context.

stitution will not be engaged in trade or commerce when it undertakes activities in furtherance of its core mission. But when, as is the case here, an institution's business motivations, in combination with the nature of the transaction and the activities of the parties, establish a "business context" as contemplated in Begelfer, G. L. c. 93A will apply because the institution has inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play.

(b) Violation of G. L. c. 93A. The judge was warranted in finding that Boston University's actions constituted unfair or deceptive practices, and that they constituted willful and knowing violations of the statute. A practice is unfair if it is "within . . . the penumbra of some common-law, statutory, or other established concept of unfairness; . . . is immoral, unethical, oppressive, or unscrupulous; [and] . . . causes substantial injury to [other businessmen]." *PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596, 321 N.E.2d 915 (1975).* The judge was warranted in finding that Boston University's actions in the months leading up to, and after, the termination were unethical and unscrupulous, and Silber's and Westling's conduct, in particular, was unfair, oppressive, and deceptive. The university, and its principals, repudiated binding agreements and usurped Linkage's business and work force in order to promote a purely self-serving agenda. The result was to end Linkage's vitality as a going concern, at least until it might be able to reconstitute itself with its main mission still intact. In this critical aspect, the judge (and the jury before him) faced the nettlesome question of which side of the dispute to believe. In the final analysis, the matter presented a credibility choice, resolved by the fact finders squarely in favor of Linkage. This result, at the appellate level, is uncontestable in the absence of clear error of fact or law, which has not been made to appear.

(c) Damages under G. L. c. 93A are not capped. The $ 20,000 limitation on damages against charitable entities for tort liability, contained in G. L. c. 231, § 85K, does not apply to liability under G. L. c. 93A, which creates an independent statutory basis of liability. General Laws c. 93A creates "broad new rights, forbidding conduct not previously unlawful under the common law of contract and tort or under any prior statute." *Dodd v. Commercial Union Ins. Co., 373 Mass. 72, 78, 365 N.E.2d 802 (1977).* A determination that conduct is unfair or deceptive is not dependent on traditional tort or contract theories and represents a finding under a statute that creates new substantive rights. *Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 626, 382 N.E.2d 1065 (1978). Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704, 322 N.E.2d 768 (1975).* See *Miller v. Risk Mgmt. Found. of the Harvard Medical Insts., Inc., 36 Mass. App. Ct. 411, 417 n.9, 632 N.E.2d 841 (1994)* (rejecting argument that G. L. c. 231, § 85K, applied to cap a G. L. c. 93A recovery against a charitable corporation; characterizing the argument as "quite anomalous").[37]

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[37] Under G. L. c. 231, § 85K, a charitable entity is liable for a maximum of $ 20,000 in tort damages so long as its activities are in service of its core charitable mission and not "primarily commercial," language that apparently stemmed from the holdings of *Holder v. Massachusetts Horticultural Soc'y, 211 Mass. 370, 373, 97 N.E. 630 (1912), and McKay v. Morgan Memorial Coop. Indus. & Stores, Inc., 272 Mass. 121, 124, 172 N.E. 68 (1930).*

It is suggested that, because Boston University's activities at BUCEC and its contractual relationship with Linkage were in service of its core educational mission and therefore not "primarily commercial," this is irreconcilable with a conclusion that such activities constitute "trade or commerce" under G. L. c. 93A.

These two conclusions are not in conflict. The two statutes serve different purposes, and their standards are quite distinct. The "commercial transaction" threshold is passed under G. L. c. 93A if the parties to the dispute are not parties in the same venture; the "trade or commerce" test is passed if the parties and their interaction meet the factor analysis in *Begelfer v. Najarian, 381 Mass. 177, 190-191, 409 N.E.2d 167 (1980). Szalla v. Locke, 421 Mass. 448, 451-452, 657 N.E.2d 1267 (1995).* The applicable test under G. L. c. 231, § 85K, however, is a com-

6. Linkage's recovery. We now sum up the recovery that Linkage is entitled to. Under the jury's finding that Boston University violated a binding renewal agreement, Linkage should recover damages of $ 2,411,852 with interest ($ 2,148,000 for three years of lost profits plus out-of-pocket expenses of $ 338,098 less the $ 74,246 credit due Boston University for its out-of-pocket expenses).[38] Linkage cannot

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pletely different inquiry: the exception in the statute, rendering a charitable corporation liable for tort damages only where the corporation's activities are "primarily commercial in character," requires commercial activity that is "entirely disconnected" from the defendant's charitable purpose. See *Holder v. Massachusetts Horticultural Soc'y, supra.* The "commercial" and "trade or commerce" standards of G. L. c. 93A are entirely independent inquiries from the "primarily commercial" test of G. L. c. 231, § 85K, and are not reliant on a determination whether the undertaken activity serves the institution's primary charitable purpose. A charitable entity can engage in activities that are in service of its core charitable mission and still fall under the governance of G. L. c. 93A.

[38] We reject Boston University's argument that the damages awarded on this claim lacked foundation in the evidence. The jury's award of lost profits was sufficiently supported by the evidence presented at trial, in the form of exhibits and through testimony from Harkins and from Larry Carr, Linkage's chief financial officer. The jury relied on projections of future performance based on Linkage's past performance. The use of such estimates is acceptable so long as the evidence affords a "basis for a reasonable judgment." *Galvin v. Nutting-Pillman Amusement Co., 284 Mass. 314, 315, 187 N.E. 360 (1933).* The jury apparently based their award of $ 2,148,000 for lost profits by taking Carr's estimate that Linkage would have earned $ 716,000 during the first calendar year of the renewal agreement, and multiplying that figure by the three years of the renewal agreement. This was, if anything, a conservative approach, considering the rapid growth in revenues during the first three years of the base agreement and the ambitious plans to expand programs both at the BUCEC site and in other cities. The damages were calculated under correct instructions of law, and the award of lost profits satisfied the principles set forth in *Lowrie v. Castle, 225 Mass. 37, 51-52, 113 N. E. 206 (1916). See Augat, Inc. v. Aegis, Inc., 417 Mass. 484, 488, 631 N. E. 2d 995 (1994).* The jury's award of out-of-pocket damages was likewise sufficiently grounded in the evidence. A detailed breakdown of these expenses was prepared by the jury and included with their answers to special questions.

We mention briefly one other issue as to the lost profit damages. The judge found in his G. L. c. 93A decision that Linkage's compensation for the second and third years of the renewed agreement was open to negotiation. The evidence does

recover damages for Boston University's violation of the no-hire provisions of the agreements. Linkage is not entitled to recover the lost profits damages awarded by the jury on the promissory estoppel claim or the damages awarded by them on the claims asserting breach of the covenant of good faith and fair dealing and defamation. We agree with the judge's findings that the conduct of Boston University officials was violative of G. L. c. 93A and was willful or knowing, so that the damages set forth above are to be doubled under the punitive damages provision of G. L. c. 93A, § 11.[39] Finally, under G. L. c. 93A, Linkage is entitled to recover its attorney's fees and costs. The award made by the judge for trial services and expenses by Linkage's attorneys in the amount of $ 899,382.04 is supported by the record made on the issue of attorney's fees and costs. Additionally, Linkage may apply to a single justice for an award of appellate attorney's fees and costs. See *Yorke Mat. v. Castro, 406 Mass. 17, 20, 546 N.E.2d 342 (1989).*

7. Disposition. It will be easier to vacate the existing judgments and to have the judge then enter a single judgment in keeping with the conclusions reached in this opinion. The judgment entered on March 28, 1995, and the supplemental [*30] judgment entered on April 12, 1995, are vacated. The order granting Boston University judgment notwithstanding the verdict on the jury's findings that a renewed agreement was in effect and had been violated is vacated, and the jury's findings on that claim are reinstated. A new judgment is to

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not support this finding, but rather supports the jury's findings on damages outlined above.

[39] Because this G. L. c. 93A award is the more favorable award to Linkage, the jury's award of $ 1,250,000 in damages for Boston University's violation of G. L. c. 93A is to be disregarded.

enter awarding Linkage damages, together with attorney's fees, costs, and interest, in accordance with this opinion, particularly Part 6. The order denying Boston University's motion for a new trial is affirmed.

So ordered.

APPENDIX B.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 91-4660-B

LINKAGE CORPORATION,

Plaintiff

vs.

THE TRUSTEES OF BOSTON UNIVERSITY,

Defendant

AMENDED MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR NEW TRIAL ON PLAINTIFF'S CHAPTER 93A CLAIM AND FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S CHAPTER 93A CLAIM

INTRODUCTION

This is an amended memorandum of decision to correct certain typographical errors which this court corrects after notice by counsel for the plaintiff. Plaintiff, Linkage Corporation (Linkage), sued defendant, Boston University (BU), on various claims arising out of a contract dispute. The case was tried to a jury which returned a verdict against Boston University. Boston University now moves for a new trial on Linkage's

G.L. c. 93A claim. Boston University's motion for a new trial is **DENIED** because the court, in its discretion, opts to treat the jury's c. 93A verdict as advisory.

Accordingly, the court chooses to issue its own findings of fact, rulings of law and order for judgment on plaintiff's c. 93A claim. In sum, the court finds that Boston University knowingly violated c. 93A by (1) inducing Linkage to rely on Boston University's promise to enter into a new contract; (2) intentionally interfering in Linkage's relations with its employees; and (3) defaming Linkage and its principals. Accordingly, the court awards Linkage $2,053,634 in c. 93A damages and $899,841.04 in attorney's fees and costs.

RELEVANT BACKGROUND

In its complaint, plaintiff alleged, among other claims, violations of G.L. c. 93A, § 11. During jury selection,' the court stated that "the jury [will] decide the 93A claim . . . the 93A case is goingto be tried to the jury." Transcript, p. 195-196.

The jury returned a verdict against the defendant on the c. 93A claim. Defendant, asserting that the court improperly instructed the jury as to the burden of proof on the element of trade or commerce, moved for a new trial on the c. 93A claim.

DISCUSSION

There is no right to a jury trial for a claim under G.L. c. 93A. Nei v. Burley, 388 Mass. 307, 315 (1983). It is within the judge's discretion, however, to submit a c. 93A claim to the jury. Travis v. McDonald, 397 Mass. 230, 234 (1986); Service Publications Inc. v. Goverman, 396 Mass. 567, 577-578 (1986); Mass. R. Civ. P. 39(c).

Where common law claims triable to a jury are joined with a c. 93A claim, the judge has the choice of (1) letting the jury find facts on all the claims, (2) reserving to himself all aspects of a 93A claim, or (3) asking the jury for a nonbinding advisory opinion as to whether the defendant acted unfairly or deceptively. Acushnet Fed. Credit Union v. Roderick, 26 Mass. App. Ct. 604, 606 (1988); Chamberlayne School v. Banker, 30 Mass. App. Ct. 346, 354 (1991).

In this case, the court's statements that "the jury [will] decide the 93A claim," did not specify whether the jury's decision would be binding or advisory. The court chooses to treat the jury decision as advisory and issue its own findings in order to avoid a new trial should the instruction on burden of proof be in error. Cf. Int'l Totalizing Systems, Inc. v. Pepsico, Inc., 29 Mass. App. Ct. 424, 436 (1990). Moreover, by submitting proposed findings and rulings to the court, the parties have waived any claim that the jury decision be binding. See Mass.R.Civ.P. 39, Reporter's Notes. Accordingly, Boston University's motion for a new trial is **DENIED,** and I make the following factual findings.

FINDINGS OF FACT

Boston University is a charitable corporation organized under the provisions of G. L. c. 180. In 1987, BU agreed to acquire the Wang Institute, a facility located in Tyngsborough, Massachusetts. In order to obtain title to the land, buildings and personal property of the Wang Institute, BU agreed to assume all of the Wang Institute's liabilities, including a large debt service. BU has converted this indebtedness by becoming the obligor on bonds issued by the Massachusetts Health

and Educational Facilities Authority (MHEFA).[1] At the same time An Wang made a gift of two and a half million dollars to BU. Once the transfer of the Wang Center to Boston University was completed BU renamed the Wang Center facility the Boston University Corporate Education Center (CEC).

BU claims that in its operation of an entity known as the Boston University Corporate Education Center it is exempt from taxation pursuant to Section 501 (c) (3) of the Internal Revenue Code and from taxation under the revenue laws of the Commonwealth of Massachusetts. BU further claims that, as a non-profit educational institution, it was entitled to reduced postal charges for CEC mailings. BU's reliance on its status as a non-profit corporation is an important element in understanding the genesis of the breach of contract which ruptured the relationship between Linkage Corporation and BU.

In 1988, it came to the attention of responsible officials at Boston University that BU was experiencing large financial losses in operating the CEC. In the fiscal year prior to Linkage managing the facility, BU experienced a $950,000 loss. Boston University wanted to turn the situation around by establishing a substantial stream of revenue at the Boston University Education Center to offset the large debt service and other overhead costs which this facility was plagued by.

At this time, Philip J. Harkins (Harkins), the future principal and CEO of the plaintiff Linkage, was employed as a vice-president at Keene, Inc. (Keene). At Keene, Harkins was principally engaged in the development of educational programs aimed at training corporate employees in automation technol-

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[1] Under the terms of MHEFA's legislative mandate its financing benefits are only available to "non-profit" educational or medical institutions whose programs further education. G. L. c, 69 App., § 2.3.

ogy skills. Price, the dean of BU's Metropolitan College,[2] contacted Harkins for the purpose of establishing a program at Metropolitan College to train people to become computer programmers after they had lost their jobs due to "downsizing."

Price's idea was to propose such a program to the Commonwealth's Division of Employment Security. Metropolitan College planned to charge the tuition costs to the state agency, who it was foreseen would be desirous of reducing the number of persons on the unemployment rolls. The program would additionally serve to improve the Massachusetts business climate by having available a large pool of trained programmers for the high technology sector of Massachusetts industry. At the time that the Price-Harkins contacts were taking place, Keene was involved as a "for-profit" trainer of computer programmers, and Harkins was skilled in setting up and running automation technology courses.

Harkins, through his contacts with Dean Price met BU Vice-President for External Programs, J. Joseph Meng (Meng). Dean Price, as Dean of Metropolitan College, reported to Meng under BU's administrative hierarchy. Meng was closely associated with, and a personal friend of, BU president John Silber. Indeed, as late as November 1990, Meng and his wife vacationed in Grenada with President Silber and his wife. Meng, a food and wine connoisseur, helped President Silber select vintage wines for his wine cellar. It was Meng's responsibility, among his other duties, to directly supervise the affairs of the former Wang Center and Metropolitan College. Meng, a graduate of Catholic University and the Columbia Law School, is an experienced academic administrator. He taught law at the Catholic University of Puerto Rico, and began his administrative career by becoming Assistant to the President of the Catholic University of Puerto Rico.

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[2] Metropolitan College is BU's continuing education night and weekend division.

Meng was the Dean of Students and Vice Chancellor for ten years at City College of New York (CCNY) . He was the President of the Culinary Institute of America and then held an administrative post at Antioch Law School before coming to Boston University as Vice-President for Labor Relations.

Meng was given major responsibility by Boston University in 1984 when he was promoted to Vice-President for External Affairs. He was in that position until 1991 when he resigned his position because of President Silber's actions in terminating the Linkage contract. His resignation, as will be seen by the findings which follow, was an action of courage and integrity which is seldom demonstrated today. Moreover, his resignation led to his wife resigning her important post as BU's Vice-President of Alumni Affairs, the loss of free tuition for his two sons and the curtailment of other perquisites.

Dean Price wanted Harkins to work for BU and set up an expanded program to train computer programmers at the CEC in Tyngsborough. Harkins, on his part, wanted to create his own company to train corporate personnel and others in automation technology. Harkins' concept was to forge a "link" between the corporate and academic worlds for the purpose of marketing his concept of training in automation technology to corporate employees displaced from employment by corporate "downsizing" or mergers and acquisitions. Harkins conceptualized that the displaced employees could be re-trained for employment in high technology industries. This "link" concept led Harkins to name his company, Linkage Corporation.

Harkins declined to work for the university, instead he offered his services through the "for-profit" corporation he had conceptualized. This in turn led through the summer of 1988 to extensive negotiations between Meng, on BU's behalf, and Harkins, on behalf of Linkage, to have Linkage operate the Wang Center in Tyngsborough for BU. On July 29, 1988,

Harkins formally incorporated Linkage as a Massachusetts "for-profit" corporation.

During the course of the negotiations, Meng reported to the BU board of trustees that it was not expected that the new facility at Tyngsborough, which was now to be called the Boston University Corporate Education Center (BUCEC) , would turn a profit for at least three years, and perhaps for as long as five years. President Silber was aware and understood, that it would take the entire contract term of three years, and perhaps a longer period of time, to turn the situation around at the Wang Center.

In the BU hierarchy, Meng ostensibly reported to the Provost, Dennis Berkey. In respect to any major undertaking, Meng was also required to receive ultimate approval from BU's Executive Vice President, Jon Westling. This hierarchical structure would make sense in a university setting where the provost generally deals with academic problems, and a person such as Westling would deal with financial, building and grounds, security, and asset management problems. In reality, the BU management picture was much more flexible. If the case was in classical times that all roads led to Rome, at BU everything led to Silber.

Meng, as a friend and confidant of Silber, did not need authority from anyone to bind BU in agreements with third parties dealing with Metropolitan College, Boston University Educational Center, or other external programs he was responsible for. Meng dealt directly with Silber, Berkey and Westling by simply running things by them. Meng executed contracts for BU. His contractual authority was continually ratified by the university through the acts of Silber, Berkey and Westling. Indeed, Westling abandoned any pretense of adhering to some chain of authority. Instead, he gave Meng free rein and trusted him completely. Westling's supervision was limited to reading and routinely approving memoranda

forwarded to him by Meng. Westling's testimony makes clear that he had confidence in Meng and that to the end he believed that Linkage's performance in running BUCEC was superlative. Westling had such complete faith in Meng's and Harkins' running of BUCEC that he paid little attention to any details about the Tyngsborough operation, except to keep an eye on the bottom line.

On July 15, 1988, and again on July 22, 1988, Meng submitted a memoranda to Westling which contained the important points of the proposed Linkage-BU contract for the operation of the Boston University Corporate Education Center. Meng was very enthusiastic about the proposal he had put together with Harkins. Meng informed Westling that although he did not want to oversell the Linkage proposal he wanted to emphasize that he was making a very strong case that BU enter into the agreement.

Dennis Hart, Esq., BU's associate general counsel, prepared the drafts of the proposed contract. The drafts reflected, in general, the oral negotiations that were being conducted between Meng and Harkins. Meng, in addition to conferring with Hart, also met with Silber and Westling. Although Meng consulted with his superiors at BU, Meng was essentially given *carte blanche* authority to put the deal through with Harkins. Harkins reasonably was under the impression that Meng possessed actual authority to bind BU to the deal. Indeed, Harkins was not informed by Dennis Hart or any other responsible BU official that Meng lacked authority to negotiate and bind BU to the deal. Meng did inform Harkins that he was discussing the contract with senior BU officials in order to obtain the necessary verbal approvals to finalize the agreement. During the course of these negotiations Meng brought Harkins to meet Jon Westling and Dennis Berkey at the University's administrative offices. At this meeting Harkins discussed his academic and professional experience with the BU

officials. Harkins assumed that he had been brought to BU by Meng for the purpose of briefing Westling and Berkey on his plans for making the Tyngsborough center profitable. At no time during the meeting did Meng, Berkey or Westling indicate that it was necessary to obtain the approval of these men or of President Silber before the contract could go into effect. Indeed, during the entire discussions which took place between these men no aspect or detail of the contract which was slated to be executed was raised by any party present.

On August 1, 1988, Meng acting for BU, and cloaked with authority by his superiors, executed the Linkage - BU contract with Harkins. In this agreement Linkage agreed to provide services for BU at the Wang Center in Tyngsborough. It was at this time that the Wang Center, which had been re-named the Boston University Education Center by BU, was again renamed at Harkins' suggestion to be known in the future as the Boston University Corporate Education Center. A hallmark of the degree of Meng's involvement in this agreement was that BU's general counsels office, when they drafted the contract, named Meng as the proper party to accept legal notices on BU's behalf.

The contract executed between BU and Linkage on August 1, 1988 has been designated by the litigating parties as the Base Agreement.

The contract contained an important provision that both BU and Linkage were prohibited from hiring each other's employees until one year after the contract expired or for one year after the contract was for any reason terminated. Harkins, who was very interested in building his own, strong and successful company, insisted on this provision.

The Base Agreement was for three years. It was to terminate on August 1, 1991. The Base Agreement called for BU to employ Linkage to manage and market educational programs and services on BU's behalf out of the former Wang Center.

The programs and training seminars were to meet the goals and standards of the university. The agreement provided that it could not be modified, amended or any provision waived unless made in writing and signed by each contracting party.

The Base Agreement provided that proprietary data such as customer lists and trade secrets were to remain BU's property. Moreover, such proprietary materials were to be surrendered by Linkage to BU at the completion of the contract term.

The Base Agreement reserved to BU the ultimate control over the activities at BUCEC, including the granting of final approval of all courses, programs, seminars, and the employment of instructors and other teaching staff. Additionally, Linkage agreed to only use BU's name and logo in promotional and marketing material when authorized by the university. President Silber, Executive Vice-President Westling and Provost Berkey never exercised any supervisory or review function over Linkage. Meng was the only BU executive officer to have any real interest in the management of BUCEC until the fateful, late summer of 1991 when President Silber was determined to terminate Linkage's relationship with BU. Meng was the only senior BU official to involve himself with the affairs of BUCEC and Linkage. Silber's, Westling's and Berkey's interest in BUCEC did not extend past the communications and reports made to them by Meng. Meng on the other hand kept a very close eye on Linkage's operation and management of BUCEC.

The Base Agreement provided that BU had the option to terminate the contract for cause, immediately upon notice to Linkage, upon the occurrence of any material breach of the terms of the contract.

At the moment that the Base Agreement was executed, Linkage had no equipment, employees, supplies or offices. Linkage consisted only of the concept devised by, Harkins, and accepted by the university, that Harkins could build a cor-

porate organization operating out of the former Wang Center to generate large cash flows for BU so that BU could carry the debt service and other overhead expenses which surrounded BU's acquisition of the Wang Center. Essentially, BU wanted to turn the Wang Center from an albatross into a golden goose.

Linkage began to run BUCEC on August 1, 1988. Linkage's contract with BU had the compensation to be earned by Linkage pegged to gross revenues. BU's intent with the BUCEC operation was to maximize the cash flow earned at both the BUCEC facility and at seminars and conferences held off the Tyngsborough site. Linkage was highly successful at generating revenues for BU through its programs. During the three years that the Base Agreement was in effect Linkage exceeded its projected revenue targets yearly. Thus, pursuant to the contract, Linkage earned a bonus payment from BU for each of the three years of the Base Agreement. The gross revenue generated in fiscal year 1988 was approximately $976,776.00. In fiscal 1989 the gross revenue was approximately $2,844,000.00; and, in 1990 the gross revenue for that fiscal year was approximately $6,252,000.00. Indeed, BU was so pleased with Linkage's earning performance that Executive Vice-President Jon Westling once referred to Linkage as a "cash cow!"

Linkage developed its own training programs which were conducted at BUCEC and it also ran and conducted seminars and training conferences both at BUCEC and off site. BU, on its own part, transferred a few university courses from its schools to the BUCEC site which Harkins then managed under the Linkage rubric. Linkage's courses, conferences and seminars were concentrated in the computer technology fields. Linkage, with BU's blessing, aimed its marketing goals and strategy at the corporate world. Harkins ran what was a David Mamet, Glengarry - *Glenross* sales operation, which hustled the corporate dollar. Little or no attention was paid to ma-

triculating students whose objective was earning a degree. Linkage, again with BU's blessing, was in the skills business. It was vocational rather than educational. A participant at Linkage classes, seminars and conferences was there to hone his or her technical proficiency. Linkage was not in existence to advance its participants intellectually in the usual and normal academic sense. Linkage and BUCEC were in business to advance their individual *customer's* careers by improving upon their employability and to advance their *corporate customer's* labor force's productivity.

The basic *raison d'etre* of computer work stations, networks and systems is to improve productivity. Computers are not designed to improve thinking or to displace the brain. At the very highest end of application, these machines, and the employee programmers, technicians and managers who run them may deal with artificial intelligence and robotics but they do not deal with the intellectual, artistic, cultural, social, ethical and scientific advancement of humankind which is the business of colleges and universities.

Boston University, at its main campus, particularly with its Metropolitan College division does offer some courses in computer applications. The College of Liberal Arts has a Computer Science Department, and BU's College of Engineering does offer courses in computer science. Boston University does teach its students computer operating systems and programming languages such as DOS, UNIX, C++ and C. Boston University's School of Management does offer courses leading to a degree in Business Administration. The focus of the University's Boston campus is on the matriculating student seeking a degree. The fact that Metropolitan College offers a few non-credit courses to interested persons who seek personal improvement or the fact that some similarity existed between a few courses offered by the Tyngsborough BUCEC facility operated by Linkage's Professional Development Seminars (PDS

Programs or PDS) and courses which duplicated or replaced courses offered at the main campus by Metropolitan College does not change the basic academic posture of the centralized BU campus along Boston's Commonwealth Avenue, and it does not change the basic commercial character of BUCEC. Indeed, as BU admitted judicially, the postal service at an adversary hearing ruled that the operation was commercial.

The inescapable conclusion from the totality of the evidence is that in contradistinction to the academic mission of the BU schools and colleges at the main campus, Linkage's operation of BUCEC at the Tyngsborough campus, and elsewhere nationally and internationally was entirely commercial in character. The sole basis that Boston University entered and maintained its contractual relationship with Linkage was to engage in trade and commerce by having BU expand its reach beyond its individual student base to the corporate market. The corporate market provided a much more lucrative earnings potential than an individual matriculating student would.

The BU-Linkage relationship was business deal between two separate corporate entities that wished to advance their own separate commercial advantages by entering the corporate market. Boston University needed Linkage to manage and operate the BUCEC facility. It was a straight management contract which was no more complex than a college or university hiring another corporation to run its food service department. The kitchen and dining room remains the property of the university. The food service company then hires the managers, cooks, food service personnel and custodial persons needed to run and operate the facility. In this case BU retained title to the BUCEC facility and its classrooms, dining facilities, and equipment. Linkage then came in under its contract to manage and operate the facility. It was in a sense BU's *privatization* of the BUCEC facility. Under BU's management the Tyngsborough campus had been losing money. Under Link-

age's management BUCEC became profitable. The contractual agreement between these two corporations was not intra-enterprise, rather it was in trade and commerce.

In February of 1990, BU Vice-President Meng negotiated with Harkins an additional and supplemental contract between the parties. Boston University wanted Linkage to manage and operate certain so-called PDS seminars which had been an effort of BU's Metropolitan College to enter the corporate market. This contract was designated by the parties as the Metropolitan College Contract or Met College Contract. The contract was also known as the PDS contract; PDS being the acronym for Professional Development Seminars. The contract did not expose BU to any financial risk as Linkage was required to pay all expenses and pay BU a 9.15% commission on all gross revenues earned by the seminars. Each party could terminate the contract upon six months written notice. Meng represented BU in the negotiations. Meng and Harkins were the exclusive representatives of the parties to the agreement but the contract was executed by BU's Assistant Treasurer Ken Congdon. I find that Congdon merely ministerially approved what Meng and Harkins had bound their entities to. I infer that the contract in final form was drafted by BU's Office of General Counsel. This contractual agreement demonstrates that Linkage was a completely separate entity from BU, that the relationship between these parties was not intra-enterprise, and that Meng possessed the power to bind BU to agreements with third party contractors.

Harkins and Meng met frequently. Harkins sent Linkage monthly reports to Meng at BU. John Tripp, a financial analyst employed by BU, regularly examined BUCEC's financial records. Meng assigned two BU employees with fiscal experience to oversee Linkage's financial operations at BUCEC. The two employees, Christine Rao and Ellen Rosenberg, were directly supervised by Phillip Harkins, but reported to Meng

and Meng's fiscal people at BU. Rao and Rosenberg remained BU employees and were paid by BU. This gave Meng and BU ample fiscal oversight over Linkage's financial affairs. Through Meng, BU's fiscal people at the main campus were cognizant of every nickel being earned and of every nickel being spent by Linkage's operation of BUCEC. There was no doubt among BU's fiscal managers in respect to the profitability and margins of the programs being run at BUCEC by Harkins. Boston University's claims to the contrary are false and pretextual.

Meng was pleased with the progress that Linkage had made at BUCEC and he reported Linkage's success to his superiors at Boston University. Meng was aware and had approved Linkage's expansion of its conference business. Meng was also aware and had approved of Linkage's development of corporate partnership in its marketing efforts with BUCEC. Meng also knew and approved of Linkage's first planned national expansion of its FPDP program to Chicago.

In November, 1990, Meng informed President Silber that he had begun negotiating the BUCEC renewal contract with Linkage. Silber was pleased, stating "That's good. That was a real good deal." From November 1990 to March 1991, Meng informed senior BU officials that he was negotiating the renewal of the BUCEC Base Agreement with Linkage. As of March 1991, Meng, on behalf of BU, and Harkins, representing Linkage, had agreed to all the material terms and conditions of the renewal contract. Harkins and Meng had agreed that the Base Agreement would now incorporate the Met College contract and some additional duties which would be assumed by Linkage. Meng had kept BU's Associate General Counsel, Dennis Hart, Esq., abreast of his progress in the negotiations with Linkage. Hart had participated in some of the discussions so he was able to concurrently prepare several proposed drafts of the agreement and keep draft agreements

current with the understandings of Harkins and Meng as they negotiated a mutually acceptable final draft.

On March 5, 1991, BU notified officials who were responsible for purchasing, hiring and contracting that any future expenditure of more than $5,000.00 for contracted services required the an approval of a Vice-President of the University and the Provost or in the alternative of Senior Vice-President Joseph Mercurio. On March 11, 1991, Meng notified Harkins of this directive.

In March 1991, Meng invited Harkins to go to Scottsdale, Arizona on April 3, 1991 to make a presentation to Boston University's senior management staff who were attending the university's annual trustees' meeting at the International Conference Resort (IRC) in Scottsdale. Boston University Trustee Richard Joaquim is the principal of IRC. Joaquim's company operates conference resort centers in several locations throughout the country, and the one at Scottsdale has complete recreational facilities including a golf course. At the meeting a formal discussion took place between President Silber, Vice-President Congdon, Vice-President Meng, Vice-President Mercurio, Executive Vice-President Westling, Phillip Harkins of Linkage and BU Trustee Richard Joaquim and his partner at IRC, Mr. Calucci. The men discussed the advisability of BU converting BUCEC into a resort hotel and conference center with a golf course, tennis courts and other amenities. Trustee Joaquim had been commissioned by President Silber and the Board of Trustees to look into the feasibility of BU converting the BUCEC site into such a hotel conference and recreation resort. Meng was strongly opposed to a university owned golf and resort conference center at BUCEC. Meng argued that there was a surplus of golf courses and hotel rooms in the area. He also argued that it was not good for the university's image to run a golf course resort. Finally he argued that Harkins and

Linkage had turned the situation around so that it was unnecessary to engage in such risk.

Meng failed to convince President Silber and Westling not to consider the golf course resort hotel project at the Tyngsborough site. This is demonstrated by a vote of the Trustees taken on June 25, 1991. On that date, the BU's Board of Trustees approved the purchase of additional land at BUCEC for the purpose of having additional acreage to use for signage and an exit-entrance ramp for BU's proposed commercial investment in a hotel/conference center with a golf course and other recreational facilities as amenities. I infer that the membership of Richard Joaquim, a hotel/resort center magnate, on the BU board of trustees had an effect on this decision, and; that Meng's outspoken opposition to the hotel/resort concept hastened his banishment from BU's inner circle of Silber advisors and confidants, and coincidentally had the effect of putting Linkage in jeopardy as the golf course/ resort hotel/conference center concept could not easily co-exist with the psuedo-academic learning *milieux* of Linkage's programs, seminars and conferences at the same site.

Soon after this meeting President Silber and Executive Vice President Jon Westling left Scottsdale together failing to attend the business plan presentation Harkins made to the rest of the assembled senior BU officials. However, even though Westling failed to attend Harkins' presentation he learned soon thereafter that the Projected gross revenues for BUCEC for fiscal 1991 - 1992 were in excess of $10,000,000.00.

Harkins presented the Linkage business plan for the next three years to the remaining BU senior executives at Scottsdale. Harkins perceived that his presentation had been well received, and he detected no difficulties in his relationship with BU's management. Harkins was pleased that he had been invited to Scottsdale to address BU's chief administrators.

Harkins reasonably relied on Meng's representations that the Base Agreement would be renewed for an additional three years. Harkins acted upon these promises by hiring additional employees and expending funds to open an office in Chicago for the purpose of expanding Linkage's FPDP business. Meng knew and approved of Harkins' plans. More importantly, Harkins made no contingency plans to move his business to another location or to find other academic sponsors or clients.

A complication arose in the BU - Linkage contractual relationship. In February, 1991, the United States Postal Service conducted an investigation concerning the potential abuse by BU of its charitable institution bulk mailing rate through Linkage's mailings for its Professional Development Seminars. The Postal Service's investigation concluded that BU had improperly used its charitable institution bulk mailing for the PDS program since Linkage was a commercial enterprise and its operations with BU were commercial the use by Linkage of BU's charitable bulk rate was unlawful. This Postal Service rate determination that the Linkage mailings were sent in a commercial context rather than in a charitable institution context was made in spite of BU's general counsel's vigorous representation before the Postal Service that the operation was charitable in nature. The Postal Service assessed BU for the deficiency in postal rates which had been underpaid for PDS mailings after the Base Agreement was terminated.

The Postal Service's adverse ruling had significant effect on Linkage's ability to turn a profit in its operation of the PDS programs under the Met College contract. Harkins and Meng discussed possible solutions to the postal problem. Harkins and Meng agreed that the solution would be to terminate the Met College contract, and merge the PDS program into the Base Agreement. Under this procedure, Linkage would no longer incur the expenses for or receive the revenues from the PDS program. From then on, the PDS program was to be at

BU's risk or benefit and Linkage would receive a management fee for managing and operating the program. Discussions between Linkage and BU on this issue continued on until May 21, 1991 when Meng, acting for BU, and Harkins, acting for Linkage, signed a letter agreement terminating the Met College contract by merging the PDS program into the Base Agreement. In the May 21, 1991 letter agreement (Trial Ex. No 39) Meng, acting with actual authority, promised that the Base Agreement would be renewed. Harkins acted on that promise by commencing to expand the PDS program to Chicago. The loss of the PDS contract by Linkage was commercially disadvantageous to it and could only be recouped through the renewal of the Base Agreement as had been agreed by the parties.

Meng's promise, in the May 21, 1991 letter, that the contract would be renewed was not happenstance. It came from a series of negotiations which started in March of 1991, between Meng, BU counsel Dennis Hart, Esq., Harkins, and Linkage comptroller Carr. These negotiations took the form of Hart transmitting a facsimile copy of a completed draft agreement to Carr on March 7, 1991. This draft stated that Linkage's compensation for the next three fiscal years would be capped at $2,609,000, $2,869,000, and $3,156,890 respectively. The draft which Hart faxed to Carr contained some handwritten interlineations which Hart asked Carr to approve. Carr on the same day replied by fax, sending Hart a clean version of the draft which had adopted Hart's suggestions. Hart also faxed Carr an internal BU memo from Hart to Meng which informed Meng that the university wanted the contract's termination clause pegged to margin rather than revenue. Hart also suggested some other minor changes which were not of much consequence.

On March 8, 1991, Hart provided Meng with a copy of the latest contract draft and informed Meng that there was some

disagreement between Hart and Carr on the treatment of the PDS contract in view of the postal problem. On April 23, 1991, Hart faxed Carr another proposed draft agreement. All issues had been agreed to except for the ultimate treatment of the PDS problem, and a new Linkage proposal that the compensation in each year be increased by a bonus based on performance. The bonus suggestion was not favored by Hart. It was suggested that Harkins should further negotiate this issue with Meng. Boston University discussed with Harkins the idea that he consider becoming an employee of the university and abandon or dissolve Linkage Corporation. Harkins consistently rejected any proposals to become a BU employee.

However, it is clear that as of May 21, 1991, the date that Harkins and Meng signed the letter agreement, that they had reached agreement on all of the subsidiary issues so as to bind the parties to a three year contract where the parties agreed to the first year compensation to be paid to Linkage leaving the compensation issue for years two and three open for further negotiation during the 1991 - 1992 fiscal year. To signal that agreement had been reached, Meng sent a copy of the draft agreement he had worked out with Hart, Carr and Harkins to Westling and Congdon. Meng, operating as he always had in running things by his ostensible line of command superiors, closed his memo to these men by saying, "Does this need some further review in order to secure University approval?" Meng and Harkins were content that the contractual relationship between BU and Linkage was to be formalized by the agreement that they had reached with Hart's and Carr's assistance. Unbeknown to Meng and Harkins, dark storm clouds were forming which would destroy their business relationship, virtually destroy Linkage Corporation, and ruin the academic careers of Meng and his wife. The resulting tempest which occurred is a classic example of the perils of micromanage-

ment by a chief executive, such as President Silber, of a major enterprise, such as Boston University.

James Devlin was a professor in the computer department of BU's College of Liberal Arts. Devlin was President Silber's son-in-law and a part-time instructor employed by Linkage at BUCEC. Through Metropolitan College's Dean Price, Devlin had nepotistically obtained a job as a part-time UNIX instructor at Linkage. Devlin, while teaching at Linkage, had developed a confrontational relationship with Harkins that was totally of Devlin's own doing, and had turned Devlin into a disgruntled and disloyal Linkage employee. Devlin became friendly with Robert Daniels, a Linkage employee who was engaged in marketing efforts for the FPDP program. Daniels was another disgruntled Linkage employee.

Daniels' salary as the marketing specialist for FPDP was dependent on commissions earned from selling the program to a fee paying participant or corporate sponsor. Daniels was not content with this arrangement. He had an argument with Harkins demanding that he be paid commissions from the fees and income earned from exhibitors at Linkage seminars, programs and conferences. Daniels had been a source of constant friction to Harkins. Daniels was the type of employee who is always more knowledgeable about an issue than anyone else, and who obliquely criticizes others out of a misguided sense of aggrandizement. Harkins on his part, tried to have a good relationship with Daniels, and did not take Daniels' public carping and criticisms personally, because although Harkins felt that Daniels was not a very productive manager, he was good with ideas and concepts in the marketing of Linkage's programs and seminars. Harkins went out of his way to have Meng transfer Daniels to the BU payroll so that Daniels, as a BU employee assigned to Linkage could take advantage of BU's employee benefit tuition waiver plan in order that Dan-

iels could finish his doctoral training at minimum cost by availing himself of BU's tuition remission program.

The storm began to gather in late March or early April 1991. At the time, James Devlin began to have discussions with his father-in-law, President Silber, about Linkage's management and operation of BUCEC. I draw the inference that President Silber took what his son-in-law reported to him with a grain of salt. I take this inference because no activity to terminate Linkage took place until June 23, 1991 when President Silber, after returning from Heidelberg, ordered a surprise audit of Linkage and took other actions to terminate Linkage's contract. Accordingly, I draw the inference that when BU acted upon these rumors and innuendoes which had been supplied to President Silber and Jon Westling by Devlin and Daniels, BU's actions were entirely pretextual being actually motivated by what I infer was a desire by Silber and Westling to gain Linkage's profits, customers and programs for BU, coupled with a desire to curry favor with BU trustee Richard Joaquim and his golf course, resort hotel and conference center concept at BUCEC.

Dr. Devlin was, as I previously found, a disgruntled Linkage employee. He had been employed to teach in the Focused Programmer Development Process (FPDP) Program. Although he was being paid $200 a day more than any other instructor at BUCEC, he had demanded additional compensation from Harkins. Harkins had refused to increase his compensation, and had informed Devlin on another occasion that his teaching performance was unsatisfactory and that it should be improved upon. Moreover, on another occasion, Harkins had been forced to chastise Devlin on his failure to properly assemble his course materials and his classroom conduct in respect to a racial issue which arose when Devlin made inappropriate racial and ethnic comments which offended some of the participants in Devlin's UNIX class, and on another occasion when Devlin

threw a computer disk at a participant. Devlin began to make unfair and inaccurate statements about Linkage which were motivated out of animus towards Harkins, and which were, I again infer, fueled by Daniels' own ambitions to gain a more lucrative and influential post at the university at the expense of Harkins and Linkage. Devlin told his father-in-law that there were grave deficiencies in Linkage's FPDP program which offered two distinct categories to its programming participants: an IBM program and a UNIX program. Devlin told President Silber that Linkage was having problems developing its UNIX program, and that he had been asked to take over a UNIX course because of student dissatisfaction. Devlin said that he had learned from others at Linkage that FPDP course development was incomplete and that course materials had not been fully tested. Devlin warned his father-in-law that Harkins' planned expansion of the FPDP program to Chicago was premature. I infer that Devlin also passed on to his father-in-law what he deemed was other gossip and negative information about Linkage that he had learned from Robert Daniels.

Daniels, in the Spring of 1991, had talked to Devlin. In this discussion, Daniels informed James Devlin that Harkins was running his own private business on BUCEC's campus in Tyngsborough. Harkins was operating an employment agency which attempted to place programmers in high-tech jobs once they were trained. This revelation to Devlin was not much of a secret since the business, which was known as Data Processing Connections, had signage in the building identifying it, and everyone, including Meng knew about it. I infer that Daniels also told Devlin that Angela Kazanjian, now Angela Kazanjian Harkins, then a BU employee assigned to Linkage was having an affair with Harkins' brother, James Harkins, a married man, who was the second highest ranked Linkage employee. I draw this inference that when Daniels met secretly with President Silber at his office on Sunday, June 30, 1991,

Daniels told President Silber that, "Angela Kazanjian was sleeping her way up." Daniels wanted Silber to know that Kazanjian could not be trusted even though she was a BU employee.

As a result of the Devlin - Daniels - Silber discussions, BU became aware that Harkins had inappropriately charged $35.00 to the BUCEC good service department for a birthday party for his mother, and that Jim Harkins had obtained a free health club membership in return for giving a PDS seminar to a handful of the health club's employees. BU should have earned 9.5% of the fees generated by this seminar. The total loss to BU was less that $300.00. I find that these indiscretions, although improper, were a de minimis violation of the contract, and not a material breach of the contract.

Daniels had never spoken or met President Silber until the week of June 23, 1991. At that time Daniels, Harkins and other key Linkage employees were in New Jersey staffing a conference which Linkage was managing. On Sunday, June 23, 1991, Daniels while in New Jersey received a call that he should call President Silber at his home in Brookline. I infer that this call was from Devlin. At 9:34 A.M. Daniels spoke on the phone with President Silber, a man he had never spoken with before, for 38 minutes. Later, in the early afternoon, at approximately 12:29 P.M., Daniels spoke on the telephone with Devlin for 172 minutes. On June 24, 1991, at 10:15 A.M., he again spoke with Devlin for 11 minutes. A few minutes later at 10:32 A.M. he spoke again with Devlin for 25 minutes. Then at 4:49 P.M., he again spoke to Devlin for 53 minutes. After this last call to Devlin he called Christine Rao to determine how the announced audit was going, and if Harkins had found out about the BU surprise audit which Silber had ordered. Later in the evening, at approximately 10:08 P.M., Daniels spoke with Devlin on the phone for over four hours. Yet another call was placed 10:06 P.M., June 25, 1991

between Devlin and Daniels which took 171 minutes to complete. At 12:03 A.M., June 26, 1991, Devlin and Daniels spoke again by telephone for a short while. This call was followed by a two and a half minute call from Christine Rao. Daniels placed another call to Devlin on June 27, 1991, at 11:53 P.M. which took 200 minutes to complete. The last call which was logged from the conference was a five minute call to Devlin at 3:17 P.M., June 28, 1991. During the period of time between June 23 and June 28, Daniels was on the phone with Devlin for approximately 15 and a half hours, with Silber for 38 minutes, and with Rao for approximately ten minutes. I infer that the purpose of these long and late evening and early morning telephone conversations between Daniels and Devlin were for the purpose of informing President Silber and other BU employees, which Daniels knew would be conducting an audit, of where potential audit findings against the Linkage Corporation would be found.

Daniels had gone to work for Linkage in 1988. At his entry in 1988, Daniels was paid $40,000 plus commissions. In the summer of 1991, just prior to BU's takeover of the BUCEC facility, Daniels was earning $45,000 a year plus approximately $15,000 in commissions. Immediately after the takeover on July 9, 1991, Daniels was appointed the Executive Director of BUCEC. Daniels' salary was increased by BU to $70,000 per year. In January of 1992, Daniels salary was increased to $100,000 a year. Daniels' employment with BU was terminated in January of 1994. On leaving BU, Daniels was provided with a severance compensation package which grossly exceeded other compensation packages granted to other BU employees, at the same level, namely one year of salary plus free tuition provided that he assist in BU's legal defense in this action.

Daniel's interest in capitalizing on Devlin's close family relationship with President Silber, to advance himself at the

expense of Harkins and the Linkage Corporation is best demonstrated by the testimony of Todd Langton, who is now a Linkage employee. Although there is obvious potential for bias on the part of this witness, I found him very open and totally credible. Langton described the events which occurred on July 3, 1991, when BU acted to take over the BUCEC site and terminate Linkage. Langton had gone to work for Linkage in January of 1991. At Linkage, Langton reported to Larry Carr when he worked on conference matters and to Roy Einreinhofer when assigned to other projects. Langton had worked on Linkage's successful Windows Conference, and on July 20, 1991, when Daniels was in charge of BUCEC's conferences, Langton worked on the Downsizing Conference which, although planned by Harkins and the Linkage staff, was held under Daniels' and Marvin Cook's direction, after Linkage had been terminated. Langton described that after BU police officers and senior BU officials such as Westling, Mercurio and Dennis Hart, Esq. had seized control of the Linkage offices at BUCEC, the Linkage employees were called to a meeting. Executive Vice-President Jon Westling spoke to the assembled employees. Westling informed the Linkage employees that the contract between BU and Linkage had been terminated for cause, even though the BU administration was proud of the accomplishments and work of the Linkage employees. Westling told the assembled employees that BU was in a position to hire most of them as BU employees and that job interviews would immediately begin. The employees were asked to sign a paper which was being circulated so that BU management could schedule the interviews with the Linkage employees present at BUCEC. Later, Phillip Harkins spoke to the Linkage employees. Harkins told the employees that the BU takeover was a breach of contract, and that the attempt to hire them to be BU employees was illegal. Harkins said that Linkage would be suing BU for the breach of contract which

had been committed by the University but that Linkage would never sue any of them or take any reprisals against them for going to work for BU. Harkins conveyed to his employees his concern for them to be able to earn a living, and that he understood why they might elect to go to work for BU.

Todd Langton was the last Linkage employee to be interviewed on July 3, 1991. BU's Marvin Cook had been appointed BUCEC executive director for the purpose of the takeover with Bob Daniels to follow him later on. Cook, a BU vice-president, and in charge of automation as Chief Information Officer, interviewed Langton at about 7:00 P.M. Cook told Langton that he had heard good things about him. I infer that this came from information supplied by Daniels and Roy Einreinhofer when they met with President Silber on June 30, 1991, at BU's administrative offices. Cook asked Langton to relate his background, education and experience. Langton kiddingly told Cook that he would like to hold the movie rights to the days events at BUCEC but Cook did not seem amused with Langton's cynicism. After approximately 20 minutes of the interview had passed Cook hired Langton for BU, and promised Langton full tuition re-imbursement for any academic program he wanted to pursue at BU. During the day of the takeover, July 3, 1991, Langton noted that Daniels and Devlin were both carrying telephone pagers. Langton had never previously observed Daniels or Devlin carrying "beepers."

Shortly after Langton arrived at his residence he received a telephone call from Daniels. Daniels spent approximately 35 minutes speaking with Langton. During the call Daniels was very chatty and gossipy. Daniels told Langton that he saw quite an opportunity for the former Linkage conference team now that BU had taken over. Daniels went over the skills and weaknesses of some of the former Linkage employees. They discussed that some of the employees had been upset and left

in tears. Daniels gave Langton the rationale for BU's takeover of the facility as basically that termination had been for cause. Cook, during the job interview, told Langton to report to work early on Monday, July 8, 1991. It was Langton's first day as a BU employee. Langton came in at 7:00 A.M. Langton noticed that Linkage correspondence addressed to Phillip Harkins and his brother James Harkins had been opened by BU employees and left on the table as trash. July 9, 1991, was Bob Daniels first day back on the job at BUCEC. Daniels invited Langton to lunch. Daniels and Langton discussed the operation of the conference department. Daniels told Langton that he had a vision for the conference department that would prove to be very successful.

Later on July 15, 1991, Langton had applied for admission to BU's School of Management, and he needed a letter of recommendation from Daniels. Langton and Daniels started to talk. Daniels told Langton that Jim and Phil Harkins, the boys from Charlestown, as he termed them, had been exposed that, $750,000 had been discovered missing from Linkage's accounts, and the Harkins brothers had shredded documents to keep them from falling into BU's hands. Daniels told Langton that he had worked hard to save their respective jobs. Daniels, also told Langton that there was a loophole in the contract which BU's lawyers had found which permitted BU to hire the former Linkage employees even though the contract between BU and Linkage proscribed such hiring for one year after termination of the contract. Daniels, dropping Executive Vice-President Jon Westling's name, told Langton that Westling was like a kid in a candy store when Daniels had described the conference business to Westling. Daniels said that Westling and the BU lawyers were looking for a way, "to permeate the-contract."

I draw the inference that Daniels and Devlin prior to June 23, 1991, were acting as agents of President Silber, and Jon

Westling on BU's behalf for the purpose of unlawfully terminating Linkage's contract with the university, defaming Phillip and James Harkins, conspiring to interfere with Linkage's advantageous contractual relationship with BU, and in league with Silber and Westling to steal Linkage's employees, in direct violation of a contractual prohibition, so that BU could continue to operate BUCEC without interruption of its planned courses, conferences, seminars and other offerings which had been demonstrated to have been highly profitable by Linkage.

Factually, the conspiracy was hatched some time prior to May 22, 1991. On May 22, Meng and Harkins met with Westling at his office. It is to be noted that President Silber had asked Westling to conduct this meeting. At this meeting, after Harkins had outlined his plans and projections for the new three year contract, Westling asked Harkins to provide him with additional information. In particular Westling wanted Harkins to detail the qualifications of each program instructor, the instructional quality of the programs offered by Linkage (i.e. a summary of the evaluations which had been submitted by course participants), an analysis of the outplacement services provided by Linkage for its participants, and information of the financial performance of Linkage programs. It is important to pause to note that Westling did not need to obtain any financial information on the fiscal performance of Linkage programs since Meng had set up a financial system which frequently provided to him a bottom line analysis of every Linkage program. Moreover, two fiscal BU employees, Rao and Rosenberg, were at the BUCEC site, for the specific purpose of reporting to Meng on fiscal matters. Thus, all Silber and Westling needed to do to obtain detailed Linkage fiscal information, was to ask Meng for it. I find that Boston University's later claim that Linkage was engaged in fiscal improprieties or failed to provide needed fiscal information when it was de-

manded has no basis in fact and that it is false. Indeed, during the three year period that Linkage had a contractual relationship with BU, the university never chose to conduct an internal audit of the operations of this corporation.

Linkage's financial performance under the Base Agreement at the close of the 1990-1991 fiscal year was exceeding projected revenue figures. On revenues of $9.7 million, Linkage produced a profit of $1.8 million.

In late May 1991, senior BU officers, led by President Silber, went to Europe to attend graduation ceremonies at BU's external Heidelberg program. Heidelberg's program was created as a continuing education program for matriculating students who were in the Armed Forces. This program, and two other foreign based programs in London and Amsterdam, were among Meng's responsibilities at BU. From Heidelberg, President Silber, on May 29, 1991, sent a telex to Westling (who was still in Boston), with copies to Congdon and Hart that if the Linkage - BU renewal contract had not been executed as yet, that its execution should be delayed until President Silber returned to Boston on June 17, 1991. President Silber did not discuss this matter with Meng who was also in Heidelberg.

In Boston, on June 24, 1991, a meeting took place in President Silber's office, attended by Silber, Harkins, Meng, and Westling. In making his presentation Harkins gave President Silber a notebook, which contained the Linkage present operating contract with BU and a draft of the proposed renewal contract for the period 1991-1994. As Harkins began making his presentation, President Silber was rude and confrontational. President Silber was shouting and interrupting Harkins to make it virtually impossible for Harkins to rationally lay out his plan for the future of BUCEC. Indeed, I find that from Silber's and Westling's perspective the real purpose of the meeting was to discover which Linkage employees should be

retained for BU's future BUCEC operation. Silber interrogated Harkins about his employees. Harkins forthrightly described the strength and weaknesses of his key employees. However, before Harkins could complete his presentation or obtain a temporary extension of the contract, Silber angrily terminated the meeting by walking out. Silber's ruse was that the financial data which Linkage was providing did not properly segregate the financial performance of Linkage programs conducted at BUCEC from those programs conducted at the BUCEC facility which were credit courses offered by BU itself. I find that President Silber knew the financial state of BUCEC, and that his protestations were false and pretextual, knowingly stated for the purpose of unlawfully breaching a solemn contractual relationship between the parties, and that the conduct of BU, President Silber and Jon Westling was in violation of the covenant of good faith and fair dealing which contracting parties owe to each other.

On June 25, 1991, while Harkins was in New Jersey, conducting a BUCEC conference, President Silber launched an unannounced internal audit of Linkage's financial records. I find that BU's motive was not a businesslike concern to verify financial data and to correct any deficiencies in accounting and reporting procedures, but rather a calculated and pre-ordained effort to justify BU's Premeditated and wrongful repudiation of the Base Agreement, the March 1991 MET Contract Agreement, and the May 21 letter agreement between Linkage and BU. The audit's only purpose and motivation was to create a pretext which would permit BU to take over the Linkage operation and to hire key Linkage employees in violation of the Base Agreement.

Harkins, put in a *Kafkaesque* situation by Silber, began to fight a rear guard action to try to salvage the situation for his company and its employees. On June 27, 1991, Harkins sent a letter to Meng with a copy to President Silber, requesting a 90-

day extension of the Base Agreement while, "the university conducts an evaluation of Linkage['s] performance and various alternatives for BUCEC." In response to this letter, President Silber told Meng that he would only give Linkage 30 days' notice from the date of his decision to terminate the contract, if his decision was not to renew. I infer that President Silber's position was communicated to Harkins by Meng. On June 28, 1991, Harkins sent a letter to Meng, which was to be attached to a memorandum which was to be sent by Meng to President Silber. In this letter, Harkins advised Meng that if the Base Agreement was not to be extended, Linkage would be forced to give termination notices to its employees on July 1, 1991, and to cease all sales and marketing efforts. In Meng's memo to President Silber, Meng informed the university president that Linkage would be forced to issue termination notices to its employees on July 1, 1991.

On Sunday, June 30, 1991, President Silber and Jon Westling arranged to meet secretly with Daniels and Roy Einreinhofer to interview them for the purpose of obtaining intelligence about Linkage's programs, operations and employees. The key person at these extraordinary sessions conducted by Silber and Westling at BU was Robert Daniels. I infer that Daniel's usefulness to Silber and Westling was that Daniels had been given the responsibility to assist in identifying and recruiting key Linkage employees who would be loyal to BU during the takeover which was to follow. I infer that Daniels was engaged by BU to shift Linkage employees to BU's cause by spreading slanderous and malicious lies among Linkage employees about alleged wrongdoing at Linkage by Harkins such as, "cooking the books," "embezzling $750,000," and "shredding financial records."[3] I find that such conduct vio-

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[3] At trial, President Silber in his testimony before the jury, used the same terminology, "cooked the books" in describing what he deemed was Harkins' wrongdoing at BUCEC.

lated the covenant of good faith and fair dealing which contracting parties owe each other.

On July 1, 1991 President Silber issued a letter which announced the appointment of Robert Daniels as BU's new executive director of the BUCEC facility, replacing Harkins. This letter was drafted prior to any actual termination. Harkins and Meng were not informed of this decision when they once again met with President Silber and Jon Westling on the same day.

On July 1, just before Harkins was admitted to President Silber's office, Meng told President Silber that he was resigning from his position at BU because he considered President Silber's conduct *vis-a-vis* Linkage to have been unethical and immoral.

After Harkins was admitted to the office, President Silber told Harkins that he would only provide Linkage with a 30 days' notice of termination if his ultimate decision was to terminate the contract between the parties. In this manner, Harkins would be able, in behalf of Linkage, to properly notify his employees of contract termination. Harkins advised Silber that if he had no assurance of the contract's renewal he would be forced to give a 30 day notice to his employees that they would be terminated. Silber told Harkins, "If you force my hand, I will go to Tyngsborough and appoint a new executive director." Harkins being mindful of the contractual proscription against stealing the other's employees, told President Silber that if the Linkage and BU contract was terminated he was interested in being able to hire BU employee Angela Kazanjian for Linkage. President Silber agreed to allow Linkage to hire Kazanjian in the event of termination.

I infer that after leaving this meeting, Harkins, now fairly well certain that BU was going to terminate its contract with Linkage began to organize whatever defense of his business he

could muster. James Harkins and Larry Carr met later with Linkage employee Roy Einreinhofer, the manager of the PDS program. Carr asked Einreinhofer whether Linkage's computerized database records of all persons who had attended or were scheduled to attend PDS seminars had been backed up on tape storage drives from the computer hard drives. Einreinhofer was instructed to take the backup tapes into his personal possession so that they could transfer the data to floppy disks for retention by Linkage. Einreinhofer told Carr and James Harkins that he was not familiar with such a transfer procedure. James Harkins ordered Einreinhofer to give the backup tapes to Angela Kazanjian. After a short time had passed, Angela Kazanjian appeared in Einreinhofer's office to take possession of the PDS backup database tapes. Einreinhofer has remained a BU employee at BUCEC managing the PDS program for the university. Einreinhofer has never been able to locate the backup database tapes he provided to Kazanjian at BUCEC again. Kazanjian is now married to James Harkins.

On this same weekend, Kazanjian, who was the manager of the BUCEC computer center, ordered Marc Vigneault to backup all BUCEC database files on to tape drives. Kazanjian received the backup tapes from Vigneault. Vigneault, now a BU employee has never been able to find these backup tapes at BUCEC.

I find that Linkage's actions in retrieving computer data of customer lists it had developed during the course of its legitimate business activities, although wrongful under the contract, was justified in, view of BU's outrageous conduct in unlawfully terminating the contract and endeavoring to destroy Linkage Corporation by stealing 38 out of its 42 employees. In the scheme of events Linkage's act of self defense was not a material breach of the contract.

On July 2, 1991, Daniels sent a letter to President Silber urging Silber to take immediate action in respect to Linkage as

Daniels believed that there would be difficulty in assuring the loyalty of Linkage employees to BU if too much delay occurred.

On July 3, 1991, President Silber scheduled another meeting with Harkins and Carr at BU. When Harkins and Carr arrived, Silber and Westling had already laid plans for the takeover and ejection of Linkage from the BUCEC campus, in the event that Harkins did not voluntarily agree to cease his operation, and voluntarily permit BU to hire all of his employees through waiving in writing the contractual provision which prohibited either party from hiring the other's employees. Accordingly, in a manner reminiscent of how a military junta of a banana republic would stage a *coup d'etat*, Silber had arranged for a number of BU personnel to gather near BUCEC's grounds. This takeover force consisted of BU vice-presidents and officers, led by Executive Vice-President Westling, included senior vice-president Joseph Mercurio and Dennis Hart, the associate general counsel, BU's police department chief, a number of uninformed and armed BU police officers in BU police cruisers, some BU police officers in plain clothes, locksmiths, internal auditing employees, and other personnel. The group's plan was to forcefully takeover and secure the facility upon receipt of Silber's orders.

As soon as Harkins and Carr had seated themselves in President Silber's office, Silber handed Harkins a multi-page typed agreement and asked Harkins to sign it. The proposed agreement which Silber had handed Harkins provided that Linkage agreed to the termination of all agreements with Boston University and that Linkage would waive the "no-hire" clause of the Base Agreement. Harkins examined the document. Harkins told Silber that this appeared to call for the destruction of his business and that he wanted his lawyer to review the document for him. Silber angrily snatched the document from Harkins hands and replaced it with a multi-

page typed termination letter. Harkins and Carr left the office with the termination letter in Harkins' hand. President Silber then launched the takeover of the Tyngsborough BUCEC facility. President Silber when he acted to terminate the contract knew or should have known that Linkage had committed no material breaches of its contract, and BU's own breach of contract were caused by the actions of its own officers which were knowing and willful, and in reckless disregard of the facts which could have been easily verified.

Immediately after leaving Silber's office, Harkins called his brother James Harkins at BUCEC. James Harkins informed Phillip Harkins that BU officials and police were in the process of taking over the BUCEC facility.

Harkins arrived at the BUCEC facility within an hour of leaving Silber's office. When he arrived, Boston University police were stationed outside of the building, and some had secured the interior of the building. Harkins was told by Dennis Hart and other BU officials that he could not remove any documents or papers, including his own personal papers and his mother's tax return, as no papers would be permitted to be removed from the facility before they were examined by BU officials. BU officials confiscated Phillip Harkins' teaching materials, books and even his personal rolodex telephone directory.

University officials gathered all the Linkage employees into a room. Executive Vice-President Jon Westling, the highest placed BU official under Silber, told the assembled Linkage employees that the BU - Linkage contract had been terminated "for cause." Jon Westling knew, at the time that he made these statements, that Linkage had not committed any material breaches of the contract. The BU officials in charge of recruiting Linkage employees, armed with previously prepared offers of employment form letters, began the process of interviewing and hiring Linkage employees. BU extended offers to

28 of the 32 Linkage employees who had worked at Linkage for Harkins. Many of these employees were enticed to leave Linkage by the granting of substantial salary increases and a much improved benefits package.

Harkins addressed the employees. He informed his employees that BU had breached its contract with Linkage. He told his employees that in his view BU's action against Linkage was illegal and that he was going to sue BU for damages. He told the employees that because of BUs actions he could not guarantee that there would be work in the short run at Linkage for them. Harkins told his employees that although it was illegal for BU to hire them in violation of the "no hire" clause of the agreement that Linkage would never take any action against them personally to harm their livelihood.

Due to BU's action of preventing Harkins and other Linkage executives from taking any papers or documents with them until they were examined and photocopied by the university, Harkins and his brother James were compelled to stay in the BUCEC building until 4:00 A.M. on July 4, 1991, when they were finally permitted to leave with the papers and documents they claimed as their own.

After BU's takeover of the former Linkage operation at BUCEC, the university continued to conduct an audit of Linkage management of the facility. The audit was conducted over approximately two months by a team of seven BU employees working in BU's office of internal audit. Inside and outside counsel employed by the university also investigated Linkage's affairs. These investigations produced no evidence that any material breaches or wrongdoing had taken place during Linkage's tenure as the manager and operator of BUCEC.

The result of BU's unlawful takeover of BUCEC, in breach of its contractual agreements, was that Linkage, as a going business was destroyed. It has taken Phillip Harkins, and the other executives at Linkage a full year to rebuild the work

force and corporation itself to the same strength it had been in on July 3, 1991.

I find that BU's action was an unfair or deceptive practice in the conduct of a trade or business as declared unlawful by the provisions of G. L. c. 93A, and that Linkage Corporation may recover its actual damages as determined by the jury, whose advisory verdict I adopt as my own damage calculations, and as I find that the acts of Boston University were a willful and knowing of G. L. c. 93A, § 2, I double the damages. Accordingly, I find that Linkage is entitled to $2,053,634 in c. 93A damages, which doubled is $4,107,268. Of this amount, $2,053,634 represents a double recovery; thus, Linkage is entitled to $2,053,634 in c. 93A damages. Moreover, pursuant to G.L. c. 93A, § 11, I award the plaintiff reasonable attorney's fees and costs as follows: $753,226.06 in attorney's fees and $146,614.98 in costs for a total of $899,841.04

RULINGS OF LAW

Linkage alleges that BU's conduct violated G.L. c. 93A, § 11 and seeks double or treble damages and attorneys' fees. To this claim, BU asserts that c. 93A liability is not warranted because (1) BU, as an educational institution, was not engaged in trade or commerce; (2) c. 93A does not apply to intra-corporate disputes; (3) on the evidence presented, BU's actions do not violate c. 93A or support a finding of double or treble damages; and (4) G.L. c. 231, § 85K caps Linkage's damages at $20,000. BU's arguments are without merit.

"The Legislature originally enacted c. 93A to improve to commercial relationship between consumers and businessmen. By requiring proper disclosure of relevant information and proscribing unfair or deceptive acts or practices, the Legislature strove to encourage more *equitable* behavior in the marketplaces." Planned Parenthood Federation of America, Inc. v.

Problem Pregnancy of Worcester, Inc., 398 Mass. 480, 492 (1986), quoting Manning v. Zuckerman, 388 Mass. 8, 12 (1983). Section 11 extends coverage "to individuals engaged in trade or commerce in business transactions with others engaged in trade or commerce." Planned Parenthood Federation of America, supra at 492. Thus G.L. c. 93A, § 11 prohibits any "unfair method of competition or an unfair, or deceptive act or practice."

In this case, BU asserts that its status as a charitable corporation precludes c. 93A liability because BU neither engages in trade nor commerce. BU's status as a charitable corporation is not, in and of itself, dispositive of the issue of whether c. 93A applies. Planned Parenthood Federation of America, Inc., supra at 493; see Miller v. Risk Management Foundation of the Harvard Medical Institutions, Inc., 36 Mass. App. Ct. 411, 416 (1994), rev. denied 418 Mass. 1104 (1994). Rather, the court should focus on whether the acts complained of were performed in a business context. Planned Parenthood Federation of America, Inc., supra at 493; Miller, supra at 416. In determining whether the parties are acting in a business context, the court should consider "the character of the party, the nature of the transaction, the activities engaged in by the party, and whether the transaction was motivated by business or personal reasons." Miller, supra at 416, quoting Barrett v. Massachusetts Insurers Insolvency Ford, 412 Mass. 774, 775-776 (1992) ; see All Seasons Services, Inc. v. Comm'r of Health & Hospitals of Boston, 416 Mass. 269, 271 (1993).

Here, it is evident that BU operated BUCEC as a commercial venture. BU's motivation in opening BUCEC was to provide a cash stream to offset the facility's debt service. BU bankrolled this operation by seeking corporate clients rather than traditional students. The University hired Linkage to manage and operate BUCEC as an ongoing independent business entity rather than educational institution. Although Link-

age provided training seminars to corporate clients under BU's auspices, and in some circumstances offered academic credit, this does not alter BUCEC's 'for profit' nature. Indeed, BU profited from BUCEC and regarded Linkage as a "cash cow." Accordingly, BU engaged in trade or commerce by operating a facility designed to provide corporate training services.

Similarly, BU's attempt to take shelter behind the $20,000 limit of G.L. c. 231, § 85K is without merit. See Miller, supra at 417 n.9. The charitable cap is applicable only "if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association. . . ." G.L. c. 231, § 85K. As discussed above, BU's activities were for business purposes, and, thus, the statute is not applicable.

BU further argues that c. 93A is inapplicable because the relationship between BU and Linkage was private in nature. "The unfair or deceptive acts or practices prohibited [under G.L. c. 93A] are those that may arise in dealings between discrete, independent business entities, and not those that may occur within a single company." Puritan Medical Center, Inc. v. Cashman, 413 Mass. 167, 179 (1992), quoting Manning v. Zuckerman, 388 Mass. 8, 12 (1983); see Szalla v. Locke, 37 Mass. App. Ct. 346, 356 (1994) (c. 93A applicable where two independent businessmen deal with each other at arm's length in a commercial context in a public arena); but see Saint Louis v. Baystate Medical Center, Inc., 30 Mass. App. Ct. 393, 404 (1991) (finding that 93A claim arising out of relationship between hospital and independently incorporated anesthesiology. department constituted an intra-enterprise dispute). Thus, c. 93A does not apply to dealings between a single, legal entity such as a partnership, see Newton v. Moffie, 13 Mass. App. Ct. 462, 467 (1982), or a corporation, see Riseman v. Orion Research, Inc., 394 Mass. 311, 314 (1985); Alperin v. E. Smelting & Refining Corp., 32 Mass. App. Ct. 539 (1992).

In this case, it is undisputed that Linkage and BU are two separate corporate entities. Linkage was an independent contractor hired by BU to manage and operate BUCEC. Although BU had ultimate control over Linkage's activities, Linkage developed its own courses, marketing strategy, and hired its own employees. There is simply no basis for finding that BU and Linkage constituted one single company.[4]

In order to hold a party liable for a violation of G.L. c. 93A, § 11 "[t]he [parties'] objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce." Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504 (1979). In the business context, a c. 93A claim may be based on a claim of promissory estoppel. See e.g. Jet-Line Services, Inc. v. American Employers Ins. Co., 404 Mass. 706, 717 (1989); Chamberlayne School Chamberlayne Jr. College v. Banker, 30 Mass. App. Ct. 346, 353 (1991); Rex Lumber Co. v. Acton Block Co. Inc., 29 Mass. App. Ct. 510, 518-519 (1990); Wasserman v. Agnastopoulos, 22 Mass. App. Ct. 672, 679 (1986); Greenstein v. Flatley, 19 Mass. App. Ct. 351, 356 (1985). In c. 93A cases, the test for promissory estoppel has two prongs: "(1) the certainty and specificity of defendant's promise, which the defendant does not fulfill; and (2) apart from defen-

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[4] BU cites Saint Louis for the proposition that close dealings between two corporations renders them one enterprise. In St. Louis, the Appeals Court determined that a dispute between a hospital and its independently incorporated anesthesiology department did not trigger a claim under c. 93A because the parties' dispute was intra-enterprise. Saint Louis is not applicable to the facts of this case as the anesthesiology corporation constituted an integral and irreplaceable part of the hospital and provided essential hospital services. Moreover, the hospital maintained total control over the anesethiology department by naming the department head, administering general hospital policy and disciplining various doctors within the anesethiology unit. Here, on the other hand, BU essentially provided Linkage a free hand to manage BUCEC. BUCEC was not a vital component of BU's day to day operations and indeed was recognized by BU as an independent entity.

dant's promise, the knowledge and foreseeability of the plaintiff's reliance and the degree of that reliance." Michael C. Gilleran, The Law of Chapter 93A § 4.12, p. 132 (1989), citing Greenstein, supra at 357 and Pappas Industrial Parks, Inc. v. Psarros, 24 Mass. App. Ct. 596, 599 (1987).

Here, both the jury verdict and this court's independent findings of fact call for the conclusion that BU violated c. 93A by inducing Linkage to rely on its promise to enter into a new contract. More colloquially put, this is a case where there has been a "pattern of conduct by one side which has dangled the other side on a string." Pappas Industrial Parks, Inc., supra at 598. Linkage established that BU made a specific and binding promise to enter into a new contract at the expiration of the Base Contract. BU knew that Linkage would rely on its promise, and, indeed, Linkage reasonably relied on BU's representations. BU did not fulfill its promise and, thus, Linkage is entitled to c. 93A damages. This court is guided by the jury's determination of damages and adopts the jury's damage award. Accordingly, Linkage is entitled to damages in the amount of $787,239.[5]

Moreover, a party liable for intentional interference with advantageous relations, can also be held liable for a violation of c. 93A. See Picciuto v. Dwyer, 32 Mass. App. Ct. 137, 139 (1992). "In an action for intentional interference with advantageous relations the plaintiff must prove that: (1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's intentional and malicious interference with it; and (4) the plaintiff's loss of advantage directly resulting from defen-

[5] Although the evidence indicates that Boston University breached the renewal agreement, the court finds that awarding c. 93A damages for both promissory estoppel and breach of contract would be duplicative.

dant's conduct." Powers v. Leno, 24 Mass. App. Ct. 381, 385 (1987).

Again, both the jury verdict and this court's findings compel the conclusion that BU violated c. 93A by unjustly interfering with Linkage's relationship with its employees. The evidence is clear: BU purposefully and maliciously interfered with Linkage's relationship with its employees in order to put Linkage out of business and allow BU to successfully run BUCEC. "Such conduct certainly falls far below the acceptable level of fair dealing that c. 93A was designed to promote and easily attains the "level of rascality" giving rise to an action under the statute." Piccicuto, supra at 139; see also Anthony' s Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 474 (conduct in disregard of known contractual arrangements and intended to secure the benefits for the breaching party constitutes an unfair act or practice); Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854, 860 (1986). Accordingly, as BU's intentional interference with Linkage's advantageous relations with its employees constitutes a violation of c. 93A, the court adopts the jury's finding as to damages and awards Linkage damages in the amount of $280,000.

Finally, BU violated c. 93A by defaming Linkage and its principals. Defamation, in a business context, is actionable as a violation of G.L. c. 93A. See McAvoy v. Shufrin, 401 Mass. 593, 601 (1988); A.F.M. Corp. v. Corporate Aircraft Management, 626 F. Supp. 1533, 1552 (D.C. Mass. 1985). The elements of a slander action consist of a false and defamatory[6] statement concerning plaintiff which is published to a third party and results in damages. Richard W. Bishop, Prima Facie Case, § 1202, p. 349 (1987). A plaintiff may recover damages

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[6] A defamatory statement is any statement which would discredit the plaintiff in the minds of a respectable segment of the community. New England Tractor Trailer Training of Ct. v. Globe Newspaper Co., 395 Mass. 471, 479 (1985).

when the spoken words constitute slander per se; i.e. the words charge plaintiff with a crime, see Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 341 (1943), or impute an unfitness for or misconduct in his office or employment, see Brown v. Journal Newspaper Co., 219 Mass. 486, 487 (1914). If, however, the statement does not constitute slander per se, the plaintiff must establish special damages. Bishop, supra at 1208, p. 361.

Here, Daniels told Langton and other BU (ex-Linkage) employees that the Harkins had cooked the books, embezzled $750,000 and shredded financial records. Clearly, Daniels' remarks charge the Harkins with criminal activities, i.e. fraud and embezzlement, and import the fact that the Harkins are unfit to run a corporation. In essence, Daniels acted as BU's agent provocateur and with the approval of the BU hierarchy, including President Silber, sowed the seeds of discord among Linkage's employees. See Int'l Brotherhood of Police Officers, Local 1433 v. Memorial Press, Inc., 31 Mass. App. Ct. 138, 140 (1991) (in order to hold employer vicariously liable for intentional conduct the court must find whether employee's conduct is motivated by a purpose to serve the employer).[7] The jury found, and this court agrees, that BU defamed Linkage. Accordingly, the court adopts the jury's damage award of $1,060,641.00.

In sum, Linkage is entitled to c. 93A damages in the amount of $2,127,880. From this amount, the court will offset the damages due to BU, $74,246, allowing for $2,053,634 in c. 93A damages. The court finds that BU's actions were willful and knowing and thus doubles the c. 93A damage award

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[7] Prior to Boston University's July 3 takeover of Linkage, Daniels, a Linkage employee, was surreptiously working on Boston University's behalf. After the takeover, Boston University hired Daniels at which point Daniels told Langton about the Harkins' supposed misdeeds. At all relevant times, however, Daniels was acting as Boston University's agent.

pursuant to G.L. c. 93A, § 11 ¶ 5. Thus, Linkage is entitled to $4,107,268. ($2,053,634 x 2) in c. 93A damages.

Of this amount, $2,053,634 represents a double recovery because the jury has previously compensated Linkage for damages pursuant to its claims for promissory estoppel, intentional interference with advantageous relations, and defamation. See Wyler v. Bonnell Motors, Inc., 35 Mass. App. Ct. 563, 568 (1993), rev. denied 416 Mass. 1111 (1994) (c. 93A damages are subsumed to damages recovered under parallel common law claims). The punitive damage component of the c. 93A damages ($2,053,634) are not, however, subsumed in the recovery of the underlying common law claim. Id. Thus, a judgment is to enter for $2,053,634 on Linkage's c. 93A claim.

Furthermore, Linkage is entitled to attorney's fees and costs. G.L. c. 93A, § 11, ¶ 6. The court will evaluate Linkage's request for attorneys' fees pursuant to the standard enumerated in Linthicum v. Archambault, 379 Mass. 381 (1979); see Miller, supra at 421. "The judge . . . should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area and the amount of awards in similar cases." Linthicum, supra at 388-389. See Miller, supra at 421.

Here, the court has thoroughly examined Linkage's submissions regarding attorney's fees. The court credits Allen van Gestell's affidavit and concludes that Morrison, Mahoney & Miller charged reasonable hourly fees for the work they performed. The court has had substantial first hand experience with this case, and acknowledges that it is a legally complex and factually intensive matter. Upon examination of Morrison, Mahoney & Miller's time sheets, however, the court concludes that Morrison, Mahoney & Miller performed unnecessary and

repetitive work. Thus, in the court's discretion, Morrison, Mahoney & Miller's outstanding fee of $1,124,218.00 is to be reduced by 33 1/3% for a total of $753,226.06. As for Morrison, Mahoney & Miller's disbursements, the court finds that the $14,262.11 in computer research fees is excessive. This fee will be reduced by 50% for a total of $7,131.05 in Lexis/Westlaw fees, allowing for a recovery of $94,182.10 in disbursements. Accordingly, BU is liable for $847,408.16 in attorney's fees. Furthermore, Linkage is entitled to recover costs it incurred in prosecuting its lawsuit. Linkage expended $33,318 for an expert witness and $19,114.88 in additional expenses for a total of $52,432.88 in fees. Accordingly, Linkage is entitled to recover $899,841.04 in attorney's fees and costs.

ORDER

This court orders that judgment enter for Linkage on its G.L. c. 93A, § 11 claim, in the amount of $2,053,634 in damages and $899,841.04 in attorney's costs and fees.

/s/

Vieri Guy Volterra
Justice of the Superior Court

Dated: March 28, 1995

/mr

APPENDIX C.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 91-4660-B

LINKAGE CORPORATION

vs.

THE TRUSTEES OF BOSTON UNIVERSITY[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ON PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff, Linkage Corporation (Linkage), commenced this action against defendant, The Trustees of Boston University (BU), after BU terminated a contract (the Base Contract) between Linkage and BU relating to Linkage's running of BU's Corporate Education Center (BUCEC) and barred Linkage and its employees (except for certain employees subsequently hired by BU, from BU's property where Linkage had its offices. Linkage's complaint alleges ten separate claims: multiple breach of contract claims in Counts I, II, and III; wrongful

[1] Defendant filed an answer with counterclaims, asserted against plaintiff, Philip J. Harkins, and James E. Harkins. However, it does not appear that either Philip J. Harkins or James E. Harkins were ever named plaintiffs in this action. Therefore, the counterclaims against them appear to be a nullity, since counterclaims can be asserted only against opposing parties. Mass. R. Civ. P. 13(.a) and 13(b), 365 Mass. 758 (1974).

entry and eviction in Count IV; defamation in Count V; intentional and/or tortious interference with advantageous relations in Count VI; breach of the covenant or good faith and fair dealing in Count VII; estoppel in Count VIII consumer protection claim under G.L. c. 93A (1990 ed.) in Count IX; and request for declaratory judgment under G.L. c. 231A (1990 ed.) in Count X. BU moved for summary judgment under Mass. R. Civ. P. 56, 365 Mass. 824-826 (1975), on all claims, except for certain portions of the claims in Count I and Count IX relating to the hiring of Linkage's employees after BU terminated its relationship with Linkage, allegedly in violation of provisions in the contract between BU and Linkage. Linkage filed a motion to amend its complaint by adding a Count XI alleging a civil conspiracy. For the following reasons, Linkage's motion to amend the complaint is denied, and BU's motion is allowed in part and denied in part.

BACKGROUND

The following undisputed material facts are taken from the materials specified in rule 56(c).[2]

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[2] This litigation to date has been particularly contentious, with little meeting of the minds - so to speak - between the parties on virtually any issue or matter. The parties submitted voluminous memoranda, affidavits and materials in support of, and in opposition to, BU's motion for summary judgment. The court ordered the parties to submit a combined joint statement as to the material facts, with the parties noting therein their objections and responses, if any, to facts included by the parties. After still further contentious bickering between the parties on the joint statement, necessitating this court's further intervention, the parties finally complied with this court's order with the slight alteration that Linkage was allowed to file a separate response to BU's responses to Linkage's objections. The court has reviewed the parties' objections and responses, the materials before the court, and the combined joint statement, in developing the BACKGROUND section herein. Generally, factual matters which the parties raised but which have not been included herein, the court deems as not being material facts necessary for the disposition of the motions before the court.

BU is a charitable corporation governed by G.L. c. 180 (1990 ed.). In 1987, BU acquired the Wang Institute, an 80,000 sq. ft. building on 220 acres located in Tyngsborough, Massachusetts. BU financed the purchase of the Wang Institute, in part, with monies available through the Massachusetts Higher Educational Financing Authority (M-HEFA). In order to maximize BU's long-term borrowing capacity, the M-HEFA bonds had to be refinanced prior to June 30, 1991.[3]

In 1988, Philip J. Harkins (Harkins) was employed by Keene, Inc. (Keene), a computer software firm. Keene, in conjunction with the Metropolitan college division of BU (MET College), operated a program whereby employees of Keene were taught certain computer programming skills. Through that program Harkins met J. Joseph Meng ("Meng"), the Vice President for BU's External Programs. Meng's areas of responsibility included, inter alia, MET College and the Wang Institute. Meng reported to Dennis Berkey (Berkey), Provost of BU, and to Jon Westling (Westling), Executive Vice President of BU. Through them, Meng reported to Dr. Silber. Meng remained Vice President for BU's External Programs until July 1991.

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[3] BU objected to this factual statement, contending that there was no authority to support it and stating that the M-HEFA bonds were not refinanced. Linkage responded that this factual statement is taken from Document no. BU036099-036100 (attached as an exhibit to an affidavit before the court), a memorandum from University Treasurer Kenneth Condon (Condon), to University President Dr. John Silber (Dr. Silber), wherein Condon stated, "'In order to maximize [BU's] long-term borrowing capacity, the two M-HEFA bond issues must be refinanced prior to June 30, 1991 . . . ,'" and Linkage also asserted that "[w]hether or not the bonds were actually refinanced is immaterial, the fact is that they were considering it." Since the refinancing of the M-HEFA was being discussed during the relevant time period leading up to BU's termination of the contracts with Linkage, an inference can be drawn that the refinancing may have been a factor in BU's decision-making process regarding Linkage's contracts.

A. The Initial Negotiations for the Base Contract.

In 1988, Harkins proposed that BU retain him, through a corporation Harkins would form (i.e. Linkage), to manage the Wang Institute and to develop and operate educational programs to be offered for a fee at the institute, to be renamed the Boston University Corporate Education Center (BUCEC).[4] During the summer of 1988, Meng and Harkins negotiated the terms of the proposed contract for several weeks. Linkage was formed on July 29, 1988. Dennis Hart, Esquire (Hart), of BU's Office of the General Counsel, prepared drafts of a proposed contract between BU and Linkage.

As part of the negotiation process, Harkins submitted projections of new costs and new program income under the proposed contract. In a memo to Westling, Meng favorably evaluated the potential for the proposed contract with Linkage to reduce protected losses from the operation of BUCEC down to a net operating loss of one million dollars at the end of the three years of the proposed contract. Prior to BU's acquisition of the Wang Institute, Meng had submitted a report to BU's trustees that projected BU could bring the Wang Institute to a break-even point within five years of the acquisition. BU considered the potential for the proposed contract to establish a stream of revenue at BUCEC to help offset overhead expenses to reduce the operating loss in the three years of the proposed contract, in deciding whether to enter into the contract with Linkage.

Meng recommended to Westling and Dr. Silber that BU enter into the proposed contract with Linkage. On July 15, 1988, and again on July 22, 1988, Meng submitted memo-

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[4] At first, the center was to be called the Boston University Technical Education Center (BUTEC), but at the time of the signing of the contract between Linkage and BU concerning the operation of the center, the name was changed to Boston University Corporate Education Center (BUCEC).

randa to Westling containing a copy of proposed contract terms and stating that while he didn't want to oversell the Harkins proposal, on the other hand he wanted to set forth "everything possible to make the case" for approval of a contract between BU and [Linkage]." Meng met several times with Dr. Silber and Westling to obtain their approval for the proposed contract. Westling and Dr. Silber reviewed the proposed contract terms and other BU officials opposed to the proposed contract's terms were afforded the opportunity to present their views. Westling and Berkey also met with Harkins and discussed Harkins' general background with him, but did not discuss any aspect of the proposed contract.

Meng informed Harkins that Meng was having discussions with senior management at BU in order to get the contract approved. Meng explained to Harkins that Meng would have to get the approval of his superiors in order to enter into the proposed contract.[5] Dr. Silber and Westling finally approved the proposed contract and authorized Meng to execute the contract on behalf of BU, although Westling is unsure whether he read the final version of the contract before it was signed by Meng. Meng technically was not actually authorized to sign the contract under BU's By-Laws.

B. <u>The Base Contract between BU and Linkage.</u>

On August 1, 1988, BU (through Meng) and Linkage signed the Base Contract whereby Linkage was to provide certain services to BUCEC. At Harkins' request, Meng made a change to the agreement by substituting the word "Corporate" for "Technical" in the center's name. See note 4, <u>supra</u>.

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[5] Harkins testified at his deposition that Meng had told him that approvals for the proposed contract from Meng's superiors had to be obtained.

At the time of the execution of the Base Contract, Linkage existed in name only. Harkins was the sole employee, and Linkage had no equipment, supplies, little if any capital, no customers (other than as a result of executing the Base Contract with BU), nor any other assets whatsoever. The "corporate offices" of Linkage consisted of Harkins' home.

Pursuant to § 2 of the Base Contract, it commenced on August 1, 1988, and by its express terms was to terminate on August 1, 1991. The Base Contract was fully integrated (§ 15.4), and included a provision that "[n]o modification, amendment, supplement or waiver of [the Base Contract] or any of its provisions shall be binding upon the parties hereto unless made in writing and duly signed by the authorized representatives of both parties," (§ 15.1). Notwithstanding the foregoing provisions, BU and Linkage on several occasions did not strictly abide by or adhere to the provisions in the Base Contract. Additionally, contrary to BU's By-Laws and § 9 of the Base Contract, various Linkage personnel executed contracts relative to Linkage's operation of BUCEC, which BU ratified.

Under §§ 3.1, 3.2, 3.4, 8.6, and 8.7, Linkage was broadly empowered, and actually required, to exercise extensive financial and managerial control over BUCEC, subject to specific limitations contained in the Base Contract. Section § 3.1 also reserved to BU "ultimate control over the educational content and direction of all activities at BUCEC, including final approval of all programs, courses, educational personnel and to whom courses of instruction may or may not be offered." Section 3.3 prohibited Linkage from electing or appointing legal counsel or depositories for BUCEC's funds or placing insurance coverage, selecting advertising agencies, or entering into commitments for improvements to the physical plant at BUCEC.

Section 4.1 provided additional cowers and duties for BU, including that BU would "provide overall direction to and supervision of BUCEC and shall exercise, at its discretion, and through the Vice President for External programs, [and have] final authority over and final decision-making power concerning . . . development and content of all education activities; [t]he recruitment and appointment of instructional personnel; and [p]romotional policy and marketing materials." Section 4.2 prohibited Linkage from using [BU's] name "in any promotional materials or advertising" without BU's approval "in advance." Under § 4.3, BU was required to provide expense funding up to certain specified limits during the first year of the Base Contract's term, with funding for operations and maintenance in the second and third year to be determined by BU in its sole discretion. Under § 4.4, payment of any expenses above the specified funding levels was the responsibility of Linkage.

Under §§ 5.1, Linkage agreed to provide the services of Harkins during the term of the Base Contract, who would "render his services to [BU] by and subject to the supervision and direction of [BU's] Office of External Programs to whom Harkins and other employees of Linkage shall report." Under § 5.2, Harkins was required to "diligently devote such time and best efforts as are reasonably required to [BU's] business and to the success of [BUCEC] and will perform his services conscientiously, efficiently and to the best of his ability." Section 5.4 further provided "that Harkins shall not engage in other business activities which interfere in any way with the performance of his duties or his responsibilities to [BU] under [the Base Contract]."

Under §§ 7.1(a) through 7.1(d), Linkage was to be paid compensation up to certain stated amounts. Under § 7.3, BU's payment to Linkage could be reduced commencing with the seventh month of the Base Contract if average monthly reve-

nues dropped below the forecasted amounts. Under § 7.4, Linkage was entitled to be paid a bonus after the second year if revenues exceeded the forecast amount for the second year, and Linkage was entitled to be paid another bonus after the third year if revenues exceeded the forecast amount for the third year.

Section 8.1 provided:

> "Linkage expressly agrees that all books and records relating in any, manner whatsoever to the business of BU, and all of the files, books and records and other materials owned by Linkage or used by it in connection with the conduct of its business in connection with [BU] or the [BUCEC], whether prepared by Harkins, other Linkage personnel, contract employees or otherwise coming into Harkins' of Linkage's possession, shall be open to inspection and available for copying by University personnel at all time."

Section 8.3 further provided:

> "Linkage hereby agrees that all right, title and interest to all inventions, discoveries, copyrightable works, patentable works, trademarks, tradenames, trade secrets, customer lists or other proprietary rights or intellectual property (hereinafter "Works") created, conceived or first put into practice by Linkage or its personnel in the course of performing this Agreement or otherwise arising out of or under this Agreement shall be granted and assigned to [BU] or shall otherwise be deemed the exclu-

> sive property of [BU]. During and after the term of this Agreement, Linkage shall, at [BU]'s request, provide such assistance as is reasonably necessary to protect [BU]'s rights and titles to and interest in such works."

Section 8.4 also provided:

> "Upon termination of this Agreement, Linkage agrees to end all further use of and immediately to return to [BU], all Works and other paper, drawings, tabulations, drawings, reports, computer programs or other documents furnished by [BU] or created or prepared by Linkage pursuant to the provisions or requirements of this Agreement."

Section 9 prohibited either Linkage or BU from hiring the employees of the other during the term of the Base Contract or for one year from the date of termination. Section 10 required Linkage to comply with "any and all local, state, or federal laws ordinances, rules and regulations concerning taxes" and provided that "Linkage's . . . violation of any law, rule or regulation will be cause for termination of [the Base Contract]." Section 11.1, in pertinent part, provided that BU "shall have the option to terminate [the Base Contract] for cause, immediately upon notice to Linkage, upon the occurrence of any of the following events: a) Linkage materially breaches any of the terms or provisions of [the Base Contract]. . . ."

Neither the Base Contract, nor any document submitted to the court, contain any provision relative to a tenancy agreement between Linkage and BU. These documents also do not contain any provision for the payment of rent by Linkage to BU for Linkage's use of the facilities at BUCEC.

Linkage commenced performance under the Base Contract on August 1, 1988. In addition to the programs developed and managed by Linkage, the so-called Unit 53 programs, various schools of BU moved certain for-credit courses to the BUCEC site, where the schools operated those courses. Ellen Rosenberg (Rosenberg) and Christina Rao (Rao), BU employees, were assigned to BUCEC. Rosenberg and Rao, who reported primarily to Harkins, provided oversight for BU for Linkage's responsibility to oversee the financial operations and controls at BUCEC. Harkins evaluated their work performance, and recommended salaries and promotions to BU. Rao also reported to Rosenberg and Larry Carr (Carr) , Linkage's Vice-president.

C. <u>The MET College Contract between BU and Linkage.</u>

In addition to the programs run by Linkage at BUCEC, MET College also operated at BUCEC a Professional Development Seminar (PDS) program through a company known as University Seminar Center (USC), owned by INC., Incorporated. The PDS program consisted of one day or two day seminars covering a broad range of management topics. In 1990, Linkage assumed the management of the PDS program through BUCEC, under a contract between BU and Linkage (the MET College Contract).

The MET College Contract was negotiated between Harkins and Meng, but was signed on behalf of BU by Condon, authorized by BU's By-Laws to sign contracts. While Condon did not know what PDS exactly entailed, he reviewed the MET College Contract and may have consulted BU's General Counsel. Under the MET College Contract, Linkage was responsible for all of the expenses associated with the PDS program, and was required to pay to BU 9.15 percent of all revenues. Thus, Linkage's profit under the MET College contract

was the net income from the PDS program, after the expenses and payment to BU of the required 9.15% of all revenues were deducted from the gross revenues. However, BU personnel, materials and equipment were used by Linkage in managing the PDS program, with the approval of Meng. Despite his status as Acting President at the time of the MET College Contract's execution, Westling admitted that he had no knowledge of that contract until the Spring 1991. Westling stated that Condon would often sign contracts on behalf of BU without informing him.

D. <u>The Base Contract Renewal Negotiations.</u>

Commencing in the latter part of 1990, Harkins began discussions with Meng regarding the possibility of BU and Linkage entering into a new contract upon the expiration of the Base Contract. Harkins and Carr held a number of discussions with Meng. Again, Hart became involved in the discussions, and various drafts of proposed new contracts were prepared. Between November, 1990 and March 1991, Meng informed senior BU officials that he was negotiating a renewal contract with Linkage. Dr. Silber was aware that Meng was negotiating a renewal contract with Linkage by March or early April 1991.

Subsequently, BU adopted a number of fiscal austerity measures, including a hiring freeze and other restrictions. On March 5, 1991, BU sent written notification to all Vice Presidents, Deans, Directors and Department Heads -- including Meng as Vice President for External Affairs and Harkins as Executive Director of BUCEC -- that effective immediately any expenditure of $5,000 or more for contracted services would require approval of the appropriate Vice President of BU and the Provost or Senior Vice President Joseph Mercurio (Mercurio). Requisitions for the purchase of such services

were required to be accompanied by written justification and routed through a review and approval process. On March 11, 1991, Meng sent a memoranda to the attention of various personnel, including Harkins, concerning BU's new policy on contracts.

In March 1991 Meng arranged for Harkins to make a presentation to BU's senior management officials who would be present at the BU Trustees' annual meeting in Scottsdale, Arizona on April 3, 1991. Meng wanted to make sure that Dr. Silber's senior staff was informed of the details of the proposed renewal contract, so that if Dr. Silber raised questions, they would be able to answer his questions. Meng informed Harkins that was the reason he wanted Harkins to make the presentation.

In June 1991, while the negotiations toward finalizing the proposed renewal contract continued, BU was also contending with an investigation by the United States Postal Service concerning potential misuse of BU's charitable bulk rate in connection with the PDS program. The postal service asserted that BU had improperly used BU's charitable bulk rate for the PDS program. The postal service maintained that the postal regulations prohibited the use of BU's charitable bulk rate for the PDS program, since USC and Linkage were not charitable entities and thus their operations under the contract with BU were considered commercial in nature. BU, through its counsel, strenuously maintained that the postal service was in error, and Linkage agreed with BU's position.[6]

If the postal service's position was correct, under the MET College contract Linkage would incur a significant postal expense, perhaps running into hundreds of thousands of dollars. Thus, Linkage's profit from running the PDS program proba-

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[6] The postal service's determination of a deficiency in postal rates was not made until after BU terminated the Base Contract.

bly would become nullified. Therefore, Harkins and Meng discussed terminating the MET College Contract and merging the PDS program into the Base Contract. As a result, Linkage would no longer incur the expenses for or receive the revenue from the PDS program, which would become BU's burden and benefit, respectively. Instead, Linkage would receive a fee for managing the program.

As part of the negotiations between Linkage and BU, and in response to specific inquiries being made by Dr. Silber and other senior BU officials, Linkage prepared and submitted to BU a Business Plan detailing Linkage's proposed operations (and expansion) of BUCEC and the PDS program for the term of three years under the proposed renewal contract. Linkage prepared a version of the Business Plan dated April 3, 1991, which subsequently was amended by a June 24, 1991, version. Prior to the Business Plan being finalized, Linkage's employees had discussions with Meng who provided input as to the type of information which should be contained therein and the manner in which it was to be presented.

Discussions and actions among and between Harkins, Carr, Hart and Meng, concerning the proposed renewal contract continued into May 1991. On March 7, 1991, Hart faxed Carr a marked version of the then proposed contract (the "March 7th Draft"). Among other things, the March 7th Draft proposed that Linkage would receive annual compensation not to exceed $2,609,000, $2,869,000 and $3,156,890, respectively, for Linkage's services during the three year life of the proposed contract. In addition, the March 7th draft contained handwritten interlineations which Hart requested that Carr insert into the proposed draft. Hart indicated that Linkage's proposed remuneration in § 7.1 was still under review by BU's HEFA expert. On the same day, Carr faxed Hart a "clean" version of the March 7th Draft incorporating Hart's proposed

changes, but Hart cannot state that he received the "clean" version.

On March 7, 1991, Hart also faxed correspondence to Carr enclosing a draft memorandum from Hart to Meng, in which Hart advised Carr that BU wanted the contract termination provision keyed to margin rather than revenue. Hart further proposed that two additional sections (11.3 and 11.4) be added to the contract to address the consequences of force majeure contingencies and material changes to the current state of the law. As outlined in Hart's correspondence and the attached memorandum, Linkage favored proceeding with the existing PDS contract (Option 2), while BU favored incorporating the PDS program into the Base Contract (Option 1). As written, the March 7 Draft incorporated Option 2.

The next day, March 8, 1991, Hart forwarded a revised memorandum to Meng (the Meng Memorandum), enclosing a copy of the March 7th Draft reflecting the changes Hart had proposed to Carr. As indicated on its face, the purpose of the Meng Memorandum was to apprise Meng of the material changes to the proposed new agreement which Hart and Carr were discussing. Hart also disclosed the parties' differing views over the treatment of the PDS program.

Seven weeks later, on April 23, 1991, Hart faxed another draft of a proposed contract to Carr. Linkage and BU still had not reached agreement as to the treatment of the PDS program. Now, Hart was proposing language along the lines of Option 1, and requesting that Linkage "come up with a proposal which allows PDS to run effectively, but which compensates you fairly with a flat fee which will be adjusted as fairness dictates from year to year." Also, the proposed compensation to Linkage for the three prospective years had been increased by an unspecified "Bonus" factor.

On April 23, Harkins was told that he should call Meng if there was a problem with BU's flat fee proposal for PDS.

Discussions also were engaged in concerning Harkins becoming an employee of BU and abandoning his interest in Linkage. On April 24, 1991, at a meeting among Carr, Meng, Hart, Harkins and John Tripp, discussion was held concerning compensation for the proposed PDS flat fee arrangement and changes to the terms of the draft contract were further discussed.

While the negotiations were proceeding, Dr. Silber also began considering the development of a conference center at the BUCEC facility. Dr. Silber's son-in-law, James Devlin, an instructor at BUCEC, advised Dr. Silber of potential problems concerning Linkage's management of BUCEC. Dr. Silber began investigating those matters.

On May 21, 1991, Linkage and Meng signed a letter agreement amending the MET College Contract. The May 21, 1991, letter provided: "BU and Linkage have agreed to terminate the [MET College] contract and to incorporate the Professional Development Seminars into the [B]ase [Contract] through which Linkage provides services to [BUCEC]. That [B]ase [Contract] is being revised and renewed effective July 1, 1991."[7]

On May 21, 1991, the same day that Harkins and Meng signed the letter agreement terminating the MET College Contract and merging the PDS program into the Base Contract, another draft of the proposed renewal contract was prepared. However, neither Harkins nor Meng signed that document or any other draft. Meng told Harkins that Meng would strongly recommend renewal of the Base Contract. Harkins understood that the proposed renewal contract would have to go through the same approval process that had been followed for the Base Contract in 1988. A May 21, 1991, memo from

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[7] The MET College Contract contained a clause permitting that contract to be coordinated with the Base Contract upon the termination of the Base Contract.

Meng to Condon, with copies to Westling and Mercurio, enclosed a copy of the May 21, 1991, draft of the proposed renewal contract, discussed various terms thereof, and concluded by stating, "Does this need some further review in order to secure [BU's] approval?"

Relative to the parties' negotiations, without extensively detailing the actions of BU and Linkage after the May 21, 1991, letter terminating the MET College Contract and merging it into the Base Contract, it is sufficient to state at this point that the parties' actions further show that BU and Linkage were still in the negotiation stage relative to the proposed renewal contract. Most importantly, a very essential term of the proposed renewal contract — namely Linkage's compensation for the three year term of the proposed renewal contract — still had not been agreed upon by Linkage and BU.[8] Another draft of the proposed renewal contract dated June 13, 1991, was prepared. Further, the issue of Linkage's management of the PDS program, and the direction BU desired to take with that program, remained unresolved and unagreed upon. Additionally, Linkage's Business Plan underwent further modifications and amendments (the final version being dated June 24, 1991) as part of the negotiations which continued between BU and Linkage.

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[8] Linkage's compensation for the proposed renewal contract changed multiple times during the negotiations. However, in all cases, the compensation to Linkage was significantly higher than under the Base Contract, e.g., under a June 13, 1991, draft of the proposed renewal contract, Linkage's compensation for the first year of the renewal period would have been 67% greater than during the third year of the Base Contract. One of Dr. Silber's primary concerns with the proposed renewal contract was Linkage's compensation. In light of the significant increase in Linkage's compensation under the proposed renewal contract, it is not surprising that Dr. Silber had serious doubts and questions concerning the efficacy of retaining Linkage's services for managing BUCEC, and that he undertook actions to obtain a detailed financial analysis and audit of BUCEC's financial performance under Linkage's management.

E. BU'S Termination of the Base Contract, and Its Acts After Termination.

After somewhat contentious meetings between Harkins, Meng, and Dr. Silber, in late June 1991 and on July 1, 1991, and between Harkins, Carr, and Dr. Silber on July 3, 1991, and after Dr. Silber received an adverse audit concerning Linkage's operation of BUCEC, BU abruptly terminated its relationship with Linkage on July 3, 1991. During the meeting of July 1, 1991, Dr. Silber notified Harkins and Linkage that any decision concerning the contracts with Linkage would not be made until after Dr. Silber received the audit results, but that BU would give Linkage thirty (30) days notice if BU decided to terminate the relationship between BU and Linkage. During the meeting Dr. Silber and Harkins discussed a mutual, amicable turnover of BUCEC to BU. After the meeting on July 1, 1991, BU drafted a letter to Linkage terminating the Base Contract and MET College Contract, and notifying Linkage that two of Linkage's employees would be assuming positions of authority at BUCEC.[9] As noted below, this letter was delivered to Harkins on July 3, 1991.

On July 2, 1991, Dr. Silber and Westling learned information tending to show that Linkage had directed one of its employees to keep possession of the backup tape of the computer data for BUCEC so that the data could be dumped onto floppy disks, removed from the facility, and transported to a new business location. Shortly thereafter, Angela Kazanjian, a BU employee who later became the wife of James Harkins, obtained the backup tape from the employee. The employee remained on at the BUCEC facility after BU terminated its rela-

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[9] Dr. Silber and other BU officials had met with these two employees in late June 1991.

tionship with Linkage, and he has never seen the backup tape since that day.

At the meeting on July 3, 1991, Dr. Silber notified Linkage, Harkins, and Carr, that BU was terminating its relationship with Linkage. Dr. Silber also virtually demanded that Harkins and Linkage acquiesce in BU's hiring of certain Linkage employees, and presented a written agreement to that effect for signature.

Harkins and Linkage refused to agree to that demand. Dr. Silber then gave Harkins the letter drafted on July 1, 1991 terminating the Base Contract and the Met College Contract.

Very shortly after this meeting, Westling, BU officials, and BU Police, entered the BUCEC facility. They secured the facility and refused to let Linkage's employees take any papers or items from the facility without BU personnel first inspecting the papers and items, even if they were personal such as tax returns. Harkins arrived at the facility. He told the employees that he could not indicate anything to then about future employment with Linkage, or even continued present employment. He also told them that Linkage and Harkins would not pursue them if they went to work for BU. BU interviewed the employees and hired virtually all of them.

The process of termination, including the employee interviews and examination of all the papers and items which Linkage and Harkins sought to remove from the facility lasted until 4:00 a.m. on July 4, 1991. During this time, BU officials and armed police searched desks end private offices of Linkage and its officials and employees at the BUCEC facility. They seized many papers and items, including Harkins' private notes concerning the Base Contract. Linkage officials and personnel were not permitted to eat or drink during this time. At one point, Linkage called the Tyngsborough police for "protection" against the treatment being afforded by BU officials and its armed police.

BU advances several reasons for its termination of the Base Contract and its decision not to enter into a new contract with Linkage, purportedly established by various facts. BU contends that Linkage did not generate the forecasted revenues and that Linkage intentionally misrepresented BUCEC's profit-generation and used subterfuge techniques, such as delaying payment of bills incurred in the third year of the Base Contract, to overstate the profit-generation at BUCEC. Further, BU contends that Linkage failed to file certain forms required by the Internal Revenue Service. BU also contends that Linkage undertook actions to pirate away certain records, documents, computer data programs and information storage, and other "Works" as defined in the Base Contract when it became apparent that BU was not going to enter into a new contract with Linkage. BU further contends that Harkins did not exclusively devote his efforts to making BUCEC a success as required by the Base Contract, that he started another company which possibly competed with BUCEC, and that he ran the company out of the BUCEC using BU personnel and supplies without authorization and for which no payment was made to BU. BU also contends that the alleged defamatory statements were never made, or if made, did not amount to defamatory statements. Linkage and Harkins dispute BU's contentions and raise other contrary facts on these matters.

DISCUSSION

Summary judgment under rule 56 "'make[s] possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved.'" Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983), quoting Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). Summary judgment shall be granted where there is no

genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Cassesso v. Commissioner of Correction, supra at 422; Community Nat'l. Bank v. Dawes, supra at 553; Mass. R. Civ. P. 56 (c). The court may enter partial summary judgment when warranted. Mass. R. Civ. P. 56(c).

The moving party bears the burden under rule 56(c) to show by credible evidence, through reference to the materials specified in rule 56(c), that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law to a judgment. Smith v. Massimiano, 414 Mass. 81, 85-86 (1992); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Where the moving party would not have the burden of proof at trial, the moving party may meet its burden under rule 56(c) either by submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Fleshner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "The inference to be drawn from the burden placed on the moving party is that his failure to establish the absence of a genuine issue of material fact must, without more from his opponent, defeat his motion." Smith v. Massimiano, supra at 86, quoting Community Nat'l. Bank v. Dawes, supra at 554.

Additionally, in ruling on a motion for summary judgment, the "record facts [are credited] most favorably to the party opposing the motion." Sullivan v. Boston Gas Co., 414 Mass. 129, 130 n. 2 (1993), citing Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied sub nom. Bailey v. Bellotti, 459 U.S. 970 (1982) , quoting Hub Assocs. v. Goode, 357 Mass. 449, 451 (1970) ("When [a] court considers the materials accompanying a motion for summary judgment, 'the inferences to be drawn from the underlying facts contained in such mate-

rials must be viewed in the light most favorable to the party opposing the motion.'"). See Parent v. Stone & Webster Engineering Corp., 408 Mass. 108, 112-113 (1990), quoting 10A C.A. Wright, A.R. Miller & M.K. Kane, Federal Practice and Procedure § 2727, at 124-125 (2d ed. 1983); Conley v. MBTA, 405 Mass. 168, 175 (1989). See also Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (lst Cir. 1993) (materials submitted on motion for summary judgment "viewed in the light most favorable to the nonmoving party"). However, once the moving party satisfies the burden imposed by rule 56(c), the party opposing the motion may not rest on his pleadings or general denials, he must respond and "'set forth specific facts' (emphasis added [by the court]) showing there is a genuine, triable issue. [Mass. R. Civ. P.] 56(e). Smith v. Massimiano, supra at 86, quoting Community Nat'l Bank v. Dawes, supra at 554; Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989).

In this court's view, the primary dispute at issue for purposes of BU's motion for summary judgment is whether BU and Linkage entered into the proposed renewal contract, which is central to Linkage's claim under Count III for breach of the purported renewal contract. The resolution of that dispute turns on two primary questions: (1) whether Meng had actual or apparent authority to enter into the purported renewal contract; and (2) whether the purported renewal contract ever reached the stage of an enforceable contract or simply remained in the negotiation stage. Predictably, BU and Linkage vigorously advance contrary views concerning what the material facts show.

BU asserts that the material facts show that Meng had no actual or apparent authority to enter into the proposed renewal contract on behalf of BU and that the proposed renewal contract remained in the negotiation stage. Linkage contends that material facts are sufficient to raise triable issues on these

questions. The court disagrees with Linkage's contention and determines that the material facts establish that the proposed renewal contract had not been entered into between Linkage and BU.

I. The Unenforceability of the Proposed Renewal Contract.

A general principle of contract law provides that when the parties use language which looks to the execution of a final written agreement, this justifies a strong inference that significant terms of the transaction are still open and therefore the parties did not intend to be contractually bound by what they had agreed upon up to that point. Rosenfeld v. U.S. Trust Co. 290 Mass. 210, 219 (1935) ; Goren v. Royal Invs., Inc., 25 Mass. App. Ct. 137, 140, 140 n. 2 (citing Rosenfeld and its progeny) rev. denied 401 Mass. 1104 (1987). An enforceable contract does not arise simply because the "parties have agreed upon certain important terms, if there has been no agreement on other essential elements of the undertaking." George W. Wilcox, Inc. v. Shell E. Petroleum Prods. , 283 Mass. 383, 390 (1933). See Air Technology Corp. v. General Elec. Co., 347 Mass. 613, 626 (1964) (failure to adequately specify essential terms ordinarily will result in unenforceable agreement). Thus, an agreement between the parties which leaves essential terms of the contract open to future negotiation is too indefinite to be enforced in court. Caagiano v. Marchegiano, 327 Mass. 574, 580 (1957); Rosenfeld v. U.S. Trust Co., supra at 216-217; Goren v. Royal Invs., Inc., supra at 140 (in Rosenfeld, "it was apparent that the negotiations were imperfect on points which were material and, indeed, weighty in the context of the transaction"); Air Technology Corp. v. General Elec. Co., supra at 626.

When an agreement is being negotiated by a person (i.e. an agent) on behalf of another (i.e. the principal), such as Meng on behalf of BU relative to the proposed renewal contract, the power to bind the principal to a contract exists only if the principal had granted actual authority to the agent to bind the principal, or the agent had apparent authority to bind the principal to the contract. See, e.g. DeVaux v. American Home Assurance Co., 387 Mass. 814, 818-819 (1983); Stern v. Lieberman, 307 Mass. 77, 79-81 (1940). "An individual in charge of a transaction usually has broad apparent authority (citations omitted) and evidence of what he has done in the ordinary course of transacting his principals business and title he has been permitted to use are admissible to prove the scope of his authority (citation quoted omitted)." Costonis v. Medford Hous. Auth., 343 Mass. 108, 115 (1961). "'Apparent authority (internal quotation marks omitted) results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to enter into negotiations or to make representations as his agent' (citations quoted omitted)." Devaux v. American Home Assurance Co., supra at 819. "The test of apparent authority of an agent" is whether the principal's words or conduct, "'reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.'" Neilson v. Malcom Kenneth Co., 303 Mass. 437, 441 (1939), quoting Globe Ticket Co. of N.E. v. Boston Retail Grocers' Ass'n, 290 Mass. 235, 238 (1935). Thus, where the circumstances do not warrant third persons exercising reasonable discretion to believe that the alleged agent with whom he is dealing has the authority to represent the principal, such principal will not be bound. Hennessey v. Cities Servs. Refining Co., 287 Mass. 487, 490 (1934).

Under BU's By-Laws, Meng did not have the actual authority to enter into the proposed renewal contract. Further,

unlike the situation in 1988 when Meng was expressly "authorized" to execute the Base Contract on BU's behalf, Meng had not been expressly authorized to execute the proposed renewal contract.[10] In fact, Meng at no time has ever professed having such authority or power. Meng's deposition testimony unequivocally establishes quite the contrary, as does the March 5, 1991, memorandum placing significant restrictions on the authority of BU officials to enter into contracts for greater than $5,000.00.

Meng's explicitly cautionary statements to Harkins about the need to obtain the approval of senior BU officials for the proposed renewal contract, coupled with the drafts of the proposed renewal contract, the requirements that Linkage submit detailed financial data and the Business Plan, that Harkins and Linkage had to make presentations to BU's senior management officials at the BU trustees' annual meeting and to Dr. Silber, and that BU was undertaking a detailed analysis of BUCEC's financial performance under Linkage's management, clearly put Harkins and Linkage on notice that the proposed renewal contract had to be approved by senior BU officials, including Dr. Silber, before it could be executed. Further, Harkins admitted in his deposition that the procedure for approval and execution of the proposed renewal contract would be the same as for the Base Contract in 1988. That procedure required approval by senior BU officials and Dr. Silber before the Base Contract could be executed.

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[10] Although Meng was "authorized by Dr. Silber and Westling to execute the Base Contract in 1988, this authorization was actually insufficient under BU's By-Laws. However, BU ratified the contract by performing thereunder and does not contest the validity of the Base Contract's formation. Any appearance of actual or apparent authority for Meng to execute the Base Contract before approval by senior BU officials is belied by Harkins' express statement that he was aware that execution of the contract hinged on approval from senior BU officials.

Therefore, this court determines that no acts by BU, or any of its officials including Meng, created either express or apparent authority for Meng to bind BU by agreeing to the proposed renewal contract with Linkage, and Harkins' and Linkage's purported reliance on Meng's "authority" was unreasonable. The May 21, 1991, letter signed by Harkins (on behalf of Linkage) and Meng (on behalf of BU) dealt primarily with the MET College Contract's termination and merger into the Base Contract. A singular aspect of that letter concerning the parties' intent to renew the Base Contract effective July 1, 1991, does not raise a sufficient factual predicate from which a "meeting of the minds" necessary for contract formation can be established. The quantum of evidence before the court, including the parties' failure to even agree on Linkage's compensation and the extent of Linkage's involvement with the PDS program under the proposed renewal contract, unwaveringly points to a lack of a "meeting of the minds."

Therefore, in this court's view, the relevant, undisputed material facts before the court establish that the negotiations for the proposed renewal contract never jelled so as to ripen the proposed renewal contract into an enforceable contract. This is not a case "where execution of a more formal instrument 'was . . . a [mere] formality.'" Goren v. Royal Invs., Inc., supra at 141-142, quoting Coan v. Holbrook, 372 Mass. 221, 224 (1951), and citing its antecedents and progeny. Accordingly, BU is entitled to summary judgment on Count III of the complaint.

II. The Remaining Claims Raised By Linkage.

The factual evidence before the court establishes that there are genuine issues of material fact relative to whether Linkage's actions relied upon by BU to terminate the contracts constituted material breaches by Linkage, whether BU en-

gaged in defamation, whether BU intentionally or tortiously interfered with Linkage's advantageous relations with other educational institutions, and whether BU's conduct and acts were "unfair or deceptive acts or practices" made unlawful by G.L. c. 93A, § 2. Therefore, BU has failed in its burden to prove the absence of genuine issues of material facts relative to those claims. Accordingly, BU is not entitled to summary judgment on the claims in Counts I, V, VI, and IX.

Since BU and Linkage terminated the MET College Contract and merged it into the Base Contract, BU is entitled to summary judgment on Linkage's claim in Count II for an alleged breach of the MET College Contract. Since the material facts establish that no tenancy agreement existed between BU and Linkage, BU is entitled to summary judgment on Count IV for alleged wrongful entry and eviction. The breach of the covenant of good faith and fair dealing claim in Count VII is covered within the breach of contract claim in Count I relating to the Base Contract, and therefore Count VII will be dismissed since it is duplicitous. The factual matters before the court do not establish an estoppel claim regarding the alleged renewal contract, and therefore BU is entitled to summary judgment on Count VIII. Linkage's request for declaratory relief under G.L. c. 231A has been foreclosed by the court's determination to grant summary judgment on count III, and therefore BU is entitled to summary judgment on Count X. The factual matters before the court do not establish a viable tort claim for civil conspiracy, and thus Linkage's motion to amend the complaint to add a Count XI for civil conspiracy will be denied.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that:

A. Plaintiff Linkage Corp.'s motion to amend the complaint to add a Count XI alleging a civil conspiracy claim is **DENIED**;

B. Defendant Boston University's motion for summary judgment is **ALLOWED IN PART AND DENIED IN PART**; and, further,

C. Judgment shall **ENTER** for defendant Boston University dismissing plaintiff Linkage Corp.'s claims under Counts II, III, IV, VII, VIII, and X of the complaint.

D. A conference will be held on **Monday, June 28, 1993 at 2:15 p.m.** to set a final pre-trial conference, a trial date, and to discuss whether the parties would be interested in mediating the remaining issues in the case prior to trial.

/s/

Patrick J. King
Justice of the Superior Court

DATED: June 15, 1993

APPENDIX D.

Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Michael S. Gardener, Esquire
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
1 Financial Center
Boston, MA 02111

RE: No. SJC-07113

LINKAGE CORPORATION
vs.
TRUSTEES OF BOSTON UNIVERSITY

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

Jean M. Kennett, Clerk

Dated: July 3, 1997

To: Peter C. Knight, Esquire
Michael S. Gardener, Esquire
Philip Burling, Esquire
Suffolk Superior Court

APPENDIX E.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS.

CHAPTER 93A.

REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION.

93A:1. **Definitions.**

Section 1. The following words, as used in this chapter unless the text otherwise requires or a different meaning is specifically required, shall mean:—

(a) "Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) "Trade" and "commerce" shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security as defined in subparagraph (k) of section four hundred and one of chapter one hundred and ten A and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

(c) "Documentary material" shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) "Examination of documentary material", the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material.

93A:2. Unfair practices; legislative intent; rules and regulations.

Section 2. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

. . . . . .

93A:11. Persons engaged in business; actions for unfair trade practices; class actions; damages; injunction; costs.

Section 11. Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether by way of original complaint, counterclaim, crossclaim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Such person, if he has not suffered any loss of money or property, may obtain such an injunction if it can be shown that the aforementioned unfair method of competition, act or practice may have the effect of causing such loss of money or property.

Any persons entitled to bring such action may, if the use or employment of the unfair method of competition or the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dis-

missal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs.

A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or thirdparty action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as hereinafter provided, with provision for tendering by the person against whom the claim is asserted of a written offer of settlement for single damages, also as hereinafter provided. No rights to equitable relief shall be created under this paragraph, nor shall a person asserting such claim be able to assert any claim on behalf of other similarly injured and situated persons as provided in the preceding paragraph. The provisions of sections ninety-five to one hundred and ten, inclusive, of chapter two hundred and thirty-one, where applicable, shall apply to a claim under this section, except that the provisions for remand, removal and transfer shall be controlled by the amount of single damages claimed hereunder.

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice was a willful or knowing violation of said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The

respondent may tender with his answer in any such action a written offer of settlement for single damages. If such tender or settlement is rejected by the petitioner, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner, then the court shall not award more than single damages.

If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action.

In any action brought under this section, in addition to the provisions of paragraph (b) of section two, the court shall also be guided in its interpretation of unfair methods of competition by those provisions of chapter ninety-three known as the Massachusetts Antitrust Act.

No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth. For the purposes of this paragraph, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth.